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A TREATISE
ON THE
LAW OF EASEMENTS.

BY
CHARLES JAMES GALE, Esq.,
^{///}
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

THE NINTH EDITION

BY
THOMAS H. CARSON,
ONE OF HIS MAJESTY'S COUNSEL: BENCHER OF LINCOLN'S INN; AUTHOR OF "LECTURES
ON PRESCRIPTION AND CUSTOM"; AND JOINT EDITOR OF "CARSON'S
REAL PROPERTY STATUTES."

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PREFACE

TO THE NINTH EDITION.

IN 1839 Mr. Gale published his treatise on the Law of Easements, and in his preface (see *post*, p. vii) drew attention to the small number of cases in which decisions of the English Courts had defined the principles of this branch of our law. Since that time many of these principles have been defined by our Courts in judgments of first-rate importance. And on several occasions judges have referred to Mr. Gale's work in terms of high commendation (*a*). These additions to our case law were incorporated in subsequent editions of Mr. Gale's treatise by successive editors, sometimes in the shape of long extracts from reported judgments. But the arrangement and the matter of the original text remained almost entirely unaltered. The last edition was published in 1908.

In the present edition it will be found that considerable changes have been made. It was thought that something could usefully be done to modernize the book. Accordingly some chapters have been rearranged; *e.g.*, the chapter dealing with "the persons against whom enjoyment must be had to give rise to prescriptive title" (p. 210); and the chapter on "the extinguishment of easements" (p. 452). In other chapters supplementary matter has been introduced; *e.g.*, the chapter dealing with "rights in respect of water" (p. 240). The statements of the older judgments have been shortened. But opportunity has been taken to introduce extracts from some modern judgments which might well be embodied in a code: as, for instance, the statement by Lord Macnaghten of the presumption in favour of the surface owner's right of support by minerals and of the circumstances sufficient to exclude the

(*a*) The following words have been used by successive judges in referring to Mr. Gale's treatise: Baron Parke, "The treatise is a very good one" (*Phesey v. Vicary*, 1847, 16 M. & W. 489). Lord Campbell, "A very excellent book" (*Renshaw v. Bean*, 1852, 18 Q. B. 124). Lord Wensleydale, "Mr.

Gale's excellent treatise on Easements" (*Roubotham v. Wilson*, 1860, 8 H. L. C. 859). Lord Westbury, "A work of great merit" (*Suffield v. Brown*, 1864, 4 D. J. & S. 193). Lord Romilly, "A very useful book" (*Watts v. Kelson*, 1870, 6 Ch. 170).

presumption (see p. 348). Again, there have been inserted some rules of the law of easements and natural rights which have been recently stated by Lord Parker in terms as terse as they are clear (see pp. 114, 122, 249, 433, 507). It is hoped that these changes may have added to the value of a book which has long been regarded as classical.

Turning to points which may be thought doubtful. It will be seen that there is one important part of the doctrine of Lost Grant on which the English and Irish Courts appear to be at variance, and which calls for an authoritative ruling on the part of the former, viz. :—Where the claim to an easement is based on lost grant, can such a grant be implied which is binding on termors, and on termors only ? (see pp. 212, 214).

Another point on which further decision would be valuable is this :—Where an easement other than light is claimed under the Prescription Act on the ground of 40 years' enjoyment, is it, or is it not, necessary to presume an absolute grant ? (see pp. 215 and 218).

Authority would also be welcome as to how far the decision of the House of Lords in *Morgan v. Fear* has affected certain of the old rules of easement law (see pp. 216, 217) ; and how far the recent decision of the Court of Appeal in *Hurst v. Picture Theatres* (which has been followed by a Divisional Court in Ireland : *Allen v. King*, 1915, 2 I. R. 213) has affected the law laid down by Baron Alderson in the well known case of *Wood v. Leadbitter* (see pp. 48, 51, 62, 63).

Again, the decisions as to the effect of the enjoyment under a mistake of a right claimed as an easement may be usefully reviewed (see pp. 230, 231). And it may be further considered how far the law should impose a limit on the variety of easements which can be created ; and how far the rule of reasonableness applies (see pp. 20, 26, and 5).

Lastly, it is open to the Court of Appeal to deal with the question whether rights in gross can be claimed under the Prescription Act (see p. 202).

As regard points which have been recently dealt with by the Courts, attention may be drawn to the decisions as to the disturbance of a private way by gates (see p. 495) ; to the decisions as to flats (see p. 425), amongst which should now be inserted *Hart v. Rogers* (1916, 1 K. B. 646) ; to the statement of the rule as to the effect upon a right of way of a change in the dominant tenement

(see p. 333) ; and to the discussion of the result on the law of light of the decision of the House of Lords in *Colls v. Home Stores* (see p. 296). The effect of increasing or diminishing the size of windows in the dominant tenement may not improbably be the subject of future litigation (see pp. 473 to 475).

A fuller Table of Contents has been added, and the cases have, by means of the Addenda, been brought down to April, 1916.

THOMAS H. CARSON.

6, NEW SQUARE,
LINCOLN'S INN,
April, 1916.

PREFACE

TO THE FIRST EDITION.

THE want of a treatise upon those important rights known in the Law of England by the name of “ Easements ” has, it is believed, been sensibly felt by the Profession.

The length of time which has elapsed without any attempt having been made to supply this want affords a sufficient reason for the appearance of the present Essay. The difficulties which arise from the abstruseness and refinements incident to the subject, have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. Upon some points, indeed, there is no authority at all in the English Law ;—of the decisions some depend upon the circumstances of the particular case, and some are irreconcilable with each other.

Water-courses are the only class of Easements with regard to which the law has been settled with any degree of precision.

A desire to remedy an admitted defect led to the passing of the Prescription Act—a statute, which has not only failed in effecting its particular object, but has introduced greater doubt and confusion than existed before its enactment. In fact, had it not been held, that the statute did not repeal the Common Law, many rights which have been enjoyed immemorially would have been put an end to by circumstances which never could have been intended to have that effect.

As in many other branches of the Law of England, the earlier authorities upon the Law of Easements appear to be based upon the Civil Law, modified, in some degree, probably, by a recognition of customs which existed among our Norman ancestors. The most remarkable instance of an adoption by the English Law from this source is the doctrine known in the French Law by the title of “ Destination du père de famille.”

In the majority of cases, both ancient and modern, probably from a consideration of this being the origin of the law, recourse has been had for assistance to the Civil Law. It has, therefore, been considered that the utility of the work would be increased by the introduction of many of the provisions of that refined and elaborate system with respect to Prædial Servitudes, and the doctrine of Prescription; as well as some of the observations of Pardessus—an eminent French writer on Servitudes.

With the same view the authority of decisions in the American Courts has been called in aid upon the subject of water-courses—questions which the value of water as a moving power, and the frequent absence of ancient appropriation, have often given rise to in the United States. In those judgments the law is considered with much care and research, and the rights of the parties settled with precision. The result of the authorities is stated by Chancellor Kent, in his well-known Commentaries, with his usual ability.

Upon many points, particularly upon the construction of the Prescription Act, the observations contained in the following pages are, in some degree, unsupported by direct authority. It has however, been thought better to endeavour to open the law upon the doubts which presented themselves than to pass them over in silence.

TEMPLE,
July, 1839.

TABLE OF CONTENTS.

PART I.

OF EASEMENTS GENERALLY.

CHAPTER I.

OF THE NATURE OF AN EASEMENT.

	PAGE
Easements distinguished from—	
Profits à prendre	1
Obligations	2
Licences	2
Customary rights	4
Natural rights	6
Easement, being property, may cause defect in title.....	7
Perpetuity, relation to easements	8

CHAPTER II.

OF THE QUALITIES OF AN EASEMENT.

1. Easements are incorporeal hereditaments	10
2. There must be two tenements	11
Dominant and servient	11
Easements in gross	12
Devolution of easements	13
3. Dominant and servient tenements must belong to different owners	14
Quasi-easements	14
4. Dominant tenements, nature of	15
5. Dominant tenement: easement must be connected with its enjoyment	17
6. Easement must be known and usual incident	20
7. As to servient tenement, easements are imposed on property, not persons	20
8. Easements cannot confer exclusive use of servient tenement ..	21
9. Easements confer no right to profits of servient tenement	22
10. Civil law requires causes of easements to be perpetual	22

CHAPTER III.

SUBJECTS OF EASEMENTS.

	PAGE
Variety of easements :—	26
Enumeration of—	
Affirmative easements	26
Negative easements	29
Continuous and discontinuous.....	29
Apparent and non-apparent	29

PART II.

OF THE ACQUISITION OF EASEMENTS.

INTRODUCTION	31
Origin of easements	31

CHAPTER I.

ACQUISITION OF EASEMENTS UNDER EXPRESS WORDS OF INSTRUMENT.

(A) Creation of easements by statute.....	33
(B) Acquisition of easements under instruments other than statute :—	
SECT. 1. From whom easements may be acquired.....	33
Statutory powers to grant easements.....	33
By whom easements may be acquired	35
SECT. 2. Nature of instrument	35
(a) Common Law.....	35
Common law decisions as to licences	36
Common law rules before Judicature Acts as to licences and creation of easements	62
Rule since Judicature Acts	63
(b) Equity.....	63
(c) Acquiescence	66
SECT. 3. Form of instrument	77
Grant at common law and under Statute of Uses	77
Covenant	80
Restrictive covenants—passing of burden and benefit thereof	80
SECT. 4. Effect of conveyance of dominant tenement	83
(A) Rights legally appurtenant to tenement conveyed.....	83
Conveyancing Act, 1881, s. 6	84
Severance of dominant tenement	86

TABLE OF CONTENTS.

xi

	PAGE
SECT. 4. Effect of conveyance of dominant tenement— <i>contd.</i>	
(B) Rights not legally appurtenant to tenement conveyed ...	87
Where severance of dominant and servient tenements, passing of quasi-easements not continuous and apparent, by express grant	87
Conveyances before 1882	87
since 1881.....	103

CHAPTER II.

ACQUISITION OF EASEMENTS BY IMPLIED GRANT.

SECT. 1. Easements other than easements of necessity.....	109
Disposition of the owner of two tenements	109
Rule forbidding derogation from grant	110
(a) Where severance of dominant and servient tenements, passing of quasi-easements continuous and apparent, by implied grant	113
Modern rule	114
Rule applies where quasi-dominant or quasi-servient tenement is in lease	124
Also where mortgagee of quasi-dominant and quasi- servient tenement sells quasi-dominant	125
Also where quasi-dominant and quasi-servient tene- ments are conveyed simultaneously	125
Rule is subject to circumstances	131
(b) Last rule considered as to rights of way	135
(c) Where severance of dominant and servient tenements, no implied reservation of quasi-easements	153
SECT. 2. Easements of necessity	167
Nature	167
Extent	174
Duration	174
Effect of unity	177
Direction	178

CHAPTER III.

ACQUISITION OF EASEMENTS BY PRESCRIPTION.

SECT. 1. The length of time during which the enjoyment must be had	183
Prescription at common law	184
Lost grant	186
Prescription Act	193

	PAGE
SECT. 2. The persons against and by whom the enjoyment must be had	210
(A) Against whom the enjoyment must be had	210
Claims by prescription at common law.....	211
Claims by lost grant	212
Claims under Prescription Act.....	214
to easements other than light	214
on twenty years' enjoyment	214
on forty years' enjoyment	215
to light	216
(B) By whom the enjoyment must be had	219
SECT. 3. Qualities and character of the necessary enjoyment	221
When enjoyment must be as of right	221
<i>nec vi</i>	224
<i>nec clam</i>	225
<i>nec precario</i>	228
Enjoyment under mistake	230
Servient owner must have knowledge actual or constructive...	231
Servient owner must have had power to prevent.....	236
Enjoyment must have been in character of easement.....	238
Enjoyment must be definite; continuous; not contrary to statute or custom	239

PART III.

OF PARTICULAR EASEMENTS AND PARTICULAR NATURAL RIGHTS OF A SIMILAR CHARACTER.

CHAPTER I.

RIGHTS IN RESPECT OF WATER.

PART 1. Natural rights as regards user and flow in natural water-course.....	240
Channel defined and known—	
(A) Overground	240
User ordinary and extraordinary	248
Fish	249
Who are riparian owners.....	250
First occupant	251
Appropriation unnecessary	252
(B) Underground	253
Channel defined but not known	254

PART 1. Natural rights, etc.— <i>contd.</i>	
Channel undefined—	
Overground	254
Underground : <i>Acton v. Blundell</i>	255, 256
PART 2. Prescriptive rights of user and flow in natural watercourse	
Channel defined	262
undefined : <i>Chasemore v. Richards</i>	264
Miscellaneous prescriptive rights	269
PART 3. Artificial watercourses.....	271
Permanent.....	272
Temporary.....	273
<i>Arkwright v. Gell</i>	273
<i>Wood v. Waud</i>	275
PART 4. Purity and pollution	279
Rights of licensee of riparian owner	283
PART 5. Acquisition of water rights.....	284
PART 6. Miscellaneous rights of riparian owners	286

CHAPTER II.

RIGHT TO LIGHT.

Acquisition of right	289
Extent of right acquired by user	290
Result of <i>Colls v. Home Stores</i>	296
Test of right to sue : Nuisance	296
Requisite evidence	296
Considerations to which Court should have regard in deciding nuisance	297
Locality	297
Light from other sources	298
Future use of dominant tenement	298
Angle of 45 degrees	300
Extraordinary light	302
Custom of London	303

CHAPTER III.

PROSPECT AND PRIVACY.

No easement	304
Covenant	305

CHAPTER IV.

AIR.

Present rule as to acquisition of right	309
Prescriptive right to defined air	310
Impure air	311

CHAPTER V.

NATURE AND EXTENT OF RIGHTS OF WAY.

	PAGE
Different kinds of ways	313
Extent of rights of way acquired by user	316
Question for jury	323
Effect of change in dominant tenement	324
Extent of rights of way acquired by implied grant	325
Extent of rights of way acquired by express grant	326
Effect of change in dominant tenement	327
Early decisions	328
Later decisions	329
User of accommodation works	331
Present rule	333
User beyond terminus ad quem.....	333
Construction of particular grants	335
Persons entitled to use	335
Mode of user	335
Extent of user	338
Definiteness and certainty	339

CHAPTER VI.

RIGHT TO SUPPORT FROM NEIGHBOURING SOIL AND HOUSES.

SECT. 1. Natural right of support to land	343
Primâ facie rule as to vertical and lateral support	344
Vertical support by subjacent minerals	346
Copyholds	346
Freeholds	347
Primâ facie rule	347
Exceptions—	
Easement to let down	347
Result of instrument of severance	348
<i>Butterknowle Co. v. Bishop Auckland</i>	
<i>Co.</i>	348
Railway Acts	354
Canal Acts	355
SECT. 2. Support to buildings from adjacent land.....	357
Buildings not entitled by common law to support	358
But right may be acquired by twenty years' user.....	360
<i>Dalton v. Angus</i>	370
Buildings must be repaired and properly constructed	371
Grant, express or implied.....	372
SECT. 3. Support to buildings by buildings	373
Right can be acquired by prescription or grant	374

	PAGE
SECT. 4. Negligence	383
Negligence in law	383
in fact	384
By public officers	388
In exercise of limited right.....	390
Public nuisance	391

CHAPTER VII.

LEGALIZATION OF NUISANCES WHICH CONSIST OF INFRINGEMENTS
OF THE NATURAL RIGHTS OF PROPERTY.

Meaning of nuisance	393
Nuisances as to—	
Air	395
Smoke and heat	396
Noise	397
Water	397
Defence to action for nuisance :—	
Convenient place	398
Reasonable use of property	399
Nuisance by others	401
Coming to nuisance	402
Right may be acquired by prescription to commit private nuisance	403
But not public nuisance	404

CHAPTER VIII.

PARTY-WALLS, BANKS, FENCES, BOUNDARY TREES AND
BUILDINGS.

Party-walls	406
Ownership	406
Easements	407
Banks	409
Fences	409
General obligation	409
Spurious easement to compel repair	410
Statutory liability to fence	412
Damage to trespassers.....	412
Boundary trees	415
Ownership	415
Overhanging	418
Boundary buildings	418

PART IV.

INCIDENTS OF EASEMENTS.

CHAPTER I.

OBLIGATION AND RIGHT TO REPAIR.

	PAGE
Position of servient owner	419
Primâ facie not liable to repair	419
But may be liable by prescription or contract	420
Landlord of flats.....	425
Liability to repair—	
Highways	430
Sea wall	431
Position of dominant owner	431
His right to repair	432
But not liable to repair.....	433
Artificial works	433
Right to deviate—	
Private ways	435
Public ways.....	435

CHAPTER II.

SECONDARY EASEMENTS.

Extent of dominant owner's rights.....	437
Dominant owner bound to repair damage	441

CHAPTER III.

EXTENT AND MODE OF ENJOYMENT.

Dominant owner cannot increase burden on servient tenement...	442
Ways	442
Light	442
Water	443
Severance of dominant tenement	448
Servient owner :—	
His duty	449
His rights	451

PART V.

OF THE EXTINGUISHMENT OF EASEMENTS.

	PAGE
SECT. 1. Extinguishment of easements by operation of law	452
Union of ownership	453
Suspension of easements	454
Revival	455
SECT. 2. Extinguishment of easements by statute.....	457
SECT. 3. Extinguishment of easements by express release	459
SECT. 4. Extinguishment of easement by implied release	460
(A.) Extinguishment implied from licence to obstruct	460
(B.) Extinguishment implied from cessation or alteration of user	460
Continuous easements.....	462
Dominant owner ceasing user	462
altering user	465
Cases as to light— <i>Tapling v. Jones</i>	469
Increasing window	473
Decreasing window.....	474
Altering plane	475
Discontinuous easements.....	480
Dominant owner ceasing user.....	480
altering user	490

PART VI.

OF THE DISTURBANCE OF EASEMENTS.

CHAPTER I.

WHAT AMOUNTS TO A DISTURBANCE.

Water	494
Way	494
Gates	495
Light	496
Quia timet	497

CHAPTER II.

REMEDIES FOR DISTURBANCE.

	PAGE
SECT. 1. Remedies by act of the party	499
Abatement :—	
Ways	500
Water	501
Light	501
Previous request.....	501
Requisite care	502
SECT. 2. Remedies by act of law	503
(a) Parties to actions	504
Who can sue :—	
Tenants	504
Reversioners	505
Who are liable to be sued	512
(b) Forms of action	517
(c) Pleadings.....	517
After Prescription Act.....	518
After Judicature Acts	520
(d) Remedy by injunction	524
Perpetual Injunctions	524
Mandatory Injunctions	526
Interlocutory Injunctions	527
Undertaking as to damages	528
Injunction or damages	529
Injunctions in respect of light	532
air.....	534
Injunctions against nuisance.....	535
Injunctions as to rights of way, water, and support	535
Injunctions as to contracts	535
Public interests	536

INDEX	539
-------------	-----

INDEX TO CASES.

A.

	PAGE
ABBOT <i>v.</i> Weekly	4
Abbott <i>v.</i> Holloway	533
Abercromby <i>v.</i> Fermoy Town Commissioners	4
Abson <i>v.</i> Fenton	439
Ackroyd <i>v.</i> Smith	12, 17, 18, 19
Acton <i>v.</i> Blundell	255, 260, 265, 266
Adams <i>v.</i> Andrews	60
— <i>v.</i> Clutterbuck	35
— <i>v.</i> Ursell	396
Adeane <i>v.</i> Mortlock	33
Albon <i>v.</i> Dremsall	340
Aldam, <i>In re</i>	34
Aldin <i>v.</i> Latimer Clark, Muirhead & Co.	2, 61, 111, 198, 310, 311, 535
Aldred's Case	241, 290, 304, 308, 310, 396, 493, 494, 506
Allan <i>v.</i> Gomme	328, 329, 330, 331, 491
Allaway <i>v.</i> Wagstaff	351
Allen <i>v.</i> Ayres	531
— <i>v.</i> Seckham	7, 70, 76, 82
— <i>v.</i> Taylor	128, 163
Alston <i>v.</i> Grant	422, 434
— <i>v.</i> Scales	506, 510
Ambler <i>v.</i> Bradford Corporation	248, 249
— <i>v.</i> Gordon	231, 302, 476
Anderson <i>v.</i> Cleland	284
— <i>v.</i> Francis	198, 533
— <i>v.</i> Oppenheimer	86
Andrew <i>v.</i> Aitken	82
Andrews <i>v.</i> Paradise	86, 495
— <i>v.</i> Waite	182, 199, 290, 475, 479, 533
Angus <i>v.</i> Dalton	6, 32, 163, 184, 186, 193, 227, 237, 289, 362, 375, 409
Ankerson <i>v.</i> Connelly	442, 443, 474, 475, 479, 497
Anon	398, 523
Arcedekne <i>v.</i> Kelk	479, 497, 524
Archer <i>v.</i> Bennett	142
Ardley <i>v.</i> St. Pancras	8, 77, 328, 337
Arkwright <i>v.</i> Gell	24, 25, 269, 271, 272, 273, 275, 276, 279
Arnold <i>v.</i> Holbrook	436
Ashburner <i>v.</i> Sewell	7
Ashby <i>v.</i> Folville	430
— <i>v.</i> White	385, 523
Aspden <i>v.</i> Seddon	20, 346, 350, 353
Atlanta Mills <i>v.</i> Masson	454
Att.-Gen. <i>v.</i> Acton Local Board	451, 536
— <i>v.</i> Antrobus	5, 20, 188, 192, 340
— <i>v.</i> Baliol	67, 68
— <i>v.</i> Barnsley	281, 404
— <i>v.</i> Basingstoke	397
— <i>v.</i> Birmingham Borough Council	398, 498, 536
— <i>v.</i> Bradford Canal Proprietors	513
— <i>v.</i> Brighton Association	316, 339
— <i>v.</i> Cambridge Gas Consumers' Co.	525, 526
— <i>v.</i> Cleaver	396
— <i>v.</i> Cole & Son	396, 401

	PAGE
Att.-Gen. <i>v.</i> Colney Hatch Lunatic Asylum	533, 536
— <i>v.</i> Conduit Colliery Co.	356, 371
— <i>v.</i> Copeland	15, 271
— <i>v.</i> Corporation of Manchester	397, 402, 497, 536
— <i>v.</i> Corporation of Nottingham	397, 497, 536
— <i>v.</i> Dorking	281, 397, 536
— <i>v.</i> Doughty	304, 369
— <i>v.</i> Drummond	79
— <i>v.</i> Earl of Lonsdale	242, 286
— <i>v.</i> Emerson	34, 242
— <i>v.</i> Esher Linoleum Co., Ltd.	316, 392
— <i>v.</i> Gauntlett	217, 220
— <i>v.</i> Grand Junction	239
— <i>v.</i> Great Central Ry.	457
— <i>v.</i> Great Northern Ry.	442
— <i>v.</i> Guardians of Poor of Union of Dorking	281, 397, 536
— <i>v.</i> Hallett	525, 528
— <i>v.</i> Horner	18, 194, 195, 224, 230
— <i>v.</i> Knight	194
— <i>v.</i> Lonsdale (Earl of)	242, 286
— <i>v.</i> Luton Local Board of Health	403, 536
— <i>v.</i> Manchester Corporation	397, 402, 497, 536
— <i>v.</i> Merthyr Tydfil Local Board	533
— <i>v.</i> Meyrick	Add.
— <i>v.</i> Mid Kent Ry.	536
— <i>v.</i> Nichol	291
— <i>v.</i> Nottingham Corporation	397, 497, 536
— <i>v.</i> Parker	79
— <i>v.</i> Plymouth Fish Co.	396
— <i>v.</i> Proprietors of Bradford Canal	513
— <i>v.</i> Queen Anne Gardens Mansions, Ltd.	198
— <i>v.</i> Rathmines and Pembroke Joint Hospital Board	398, 497
— <i>v.</i> Reynolds	195, 465
— <i>v.</i> Roe	Add., 412
— <i>v.</i> Sheffield Gas Consumers' Co.	526
— <i>v.</i> Simpson	188, 192, 287
— <i>v.</i> Terry	286
— <i>v.</i> Tomlin	346
— <i>v.</i> Welsh Granite Co.	351, 353, 354
— <i>v.</i> Wright	4, 286, 287
Austerberry <i>v.</i> Corporation of Oldham	80, 82, 160, 482
Austin <i>v.</i> Scottish Widows' Assurance Society	336, 495
Aynsley <i>v.</i> Glover	193, 289, 298, 473, 489, 528, 531

B.

BACK <i>v.</i> Stacey	291, 295, 534
Backhouse <i>v.</i> Bonomi	523
Badham <i>v.</i> Marris	458
Bagshawe <i>v.</i> Buxton	501
Bailey <i>v.</i> Appleyard	19, 22, 200, 225, 518
— <i>v.</i> Holborn and Frascati	324, 443, 474, 497
— <i>v.</i> Icke	124
— <i>v.</i> Stephens	18, 19, 202
Baily & Co. <i>v.</i> Clark, Son & Morland	29, 248, 272, 273, 277
Baines <i>v.</i> Baker	536
Baird <i>v.</i> Fortune	88
Baker <i>v.</i> Greenhill	430
Ball <i>v.</i> Herbert	171
— <i>v.</i> Ray	401
Ballacorkish & Co. <i>v.</i> Harrison	255, 261
Ballard <i>v.</i> Dyson	314, 316, 321, 322, 336
— <i>v.</i> Tomlinson	255, 280, 386, 397

	PAGE
Balston v. Bensted ...	265
Baltic Co. v. Simpson ...	534
Bamford v. Turnley ...	395, 398
Bankart v. Houghton ...	70, 71, 74
— v. Tennant ...	68, 71, 72, 76
Barber v. Penley ...	397
— v. Whitely ...	411
Baring v. Abingdon ...	88
Barker v. Faulkner ...	249, 263
— v. Green ...	498
— v. Herbert ...	392
— v. Richardson ...	190, 212, 217, 363
Barkshire v. Grubb ...	98, 101, 146, 176
Barlow v. Rhodes ...	87, 88, 143
— v. Ross ...	210, 458
Barnard v. G. W. Rail. Co. ...	458
Barnes v. Loach ...	36, 125, 476, 497
— v. Ward ...	392, 413, 415
Barr v. Baird ...	353
Barrett v. Blagrave ...	73
Barrington's Case ...	19, 202, 354
Barrow-in-Furness Corporation and Rawlinson's Contract, <i>In re</i> ...	33, 35
Bartlett v. Baker ...	513
— v. Downes ...	182
Bass v. Gregory ...	29, 192, 197, 309, 311
Bastard v. Smith ...	285
Batcheller v. Tunbridge Wells Gas. Co. ...	388, 395
Bateman v. Bluck ...	503
Baten's Case ...	270, 499, 501
Bathurst v. McPherson ...	431
Batt v. Earl of Derby ...	530
Batten v. Gedge ...	313
Batten Pooll v. Kennedy ...	163, 170, 439
Battersea (Lord) v. Commissioners of Sewers ...	201
Battishill v. Reed ...	183, 200, 238, 498, 512
Baxendale v. McMurray ...	29, 403, 444, 492
— v. North Lambeth Liberal and Radical Club, Ltd. ...	335
Baxter v. Bower ...	307, 527
— v. Taylor ...	253, 508, 509, 510, 511
Bayley v. Great Western Rail. Co. ...	100, 101, 123, 148, 169, 216, 220, 328
Baylis v. Tyssen Amhurst ...	18, 195
Beadel v. Perry ...	301, 527
Bealey v. Shaw ...	252, 262, 443
Beard v. Moira ...	Add.
Beardmore v. Treadwell ...	398
Beasley v. Clarke ...	183, 229, 519
Beaudely v. Brook ...	77, 83
Beaufort (Duke of) v. Patrick ...	67, 68, 69, 70, 71
— v. Swansea ...	79
Beddington v. Atlee ...	33, 85, 104, 124, 134, 147, 453
Beddow v. Beddow ...	527
Bedford (Duke of) v. Dawson ...	458
— v. Trustees of the British Museum ...	83
Bedingfield v. Onslow ...	506, 508
Beeston v. Weate ...	28, 263, 269, 432, 434, 441
Behrens v. Richards ...	526
Bell v. Corporation of Quebec ...	242
— v. Earl of Dudley ...	350, 353
— v. Love ...	347, 348
— v. Midland Rail. Co. ...	60, 506, 509, 510
— v. Twentyman ...	431, 508
— v. Wardell ...	4
— v. Wilson ...	351, 354
Bellamy v. Wells ...	397

	PAGE
Bendelow <i>v.</i> Guardians of Wortley Union	398
Benest <i>v.</i> Pipon	221
Benfieldside Local Board <i>v.</i> Consett Iron Co.	112, 351
Benjamin <i>v.</i> Storr	396
Bennison <i>v.</i> Cartwright	201
Bermondsey <i>v.</i> Brown	313
Bessant <i>v.</i> Great Western Rail. Co.	410
— <i>v.</i> Cunden Hill	402
Betts, Ltd. <i>v.</i> Pickfords, Ltd.	111, 124
Bewley <i>v.</i> Atkinson	199
Bibby <i>v.</i> Carter	371, 383
Bickett <i>v.</i> Morris	242, 286, 523
Bidder <i>v.</i> North Staffordshire Rail. Co.	313, 334, 337
Bidwell <i>v.</i> Holden	526
Bigsby <i>v.</i> Dickinson	395
Binckes <i>v.</i> Pash	471
Bird <i>v.</i> Dickinson	518
— <i>v.</i> Higginson	48, 62, 64
— <i>v.</i> Holbrook	415
Birkenhead <i>v.</i> L. & N. W. Ry.	433
Birmingham Canal Co. <i>v.</i> Lloyd	68
Birmingham Corporation <i>v.</i> Allen	344, 372
Birmingham, Dudley and District Bank <i>v.</i> Ross...84, 85, 105, 108, 124, 131, 133	
Bishop <i>v.</i> North	438
— <i>v.</i> Trustees of Bedford Charity	513
Bishop Auckland Local Board <i>v.</i> Bishop Auckland Iron Co.	395
Bishop Auckland <i>v.</i> Butterknowle & Co.	353
Black <i>v.</i> Ballymena Commissioners	254, 255
Blackburne <i>v.</i> Somers	273
Blackett <i>v.</i> Bradley	5, 347, 348
Blair <i>v.</i> Deakin	280, 402, 513
Blakemore <i>v.</i> Glamorganshire Canal Navigation	526, 528
Blanchard <i>v.</i> Bridges	68, 75, 121, 470
Bland <i>v.</i> Moseley	369
Blatchford <i>v.</i> Mayor of Plymouth	86
Blewett <i>v.</i> Tregonning	5, 22, 195
Bliss <i>v.</i> Hall	251, 396, 402, 403
Blockley <i>v.</i> Slater	518
Blyth <i>v.</i> Birmingham Waterworks Co.	387
— <i>v.</i> Topham	413, 415
Bodenham <i>v.</i> Pritchard	103
Bolton <i>v.</i> Bishop of Carlisle	40
— <i>v.</i> Bolton	100, 135, 178, 457
Bomford <i>v.</i> Neville	194
Bonner <i>v.</i> Great Western Railway	199, 209, 288
Bonomi <i>v.</i> Buckhouse	6, 344, 345, 346, 361, 362, 363
Booth <i>v.</i> Alcock	14, 33, 77, 86, 134
Born <i>v.</i> Turner	84, 107, 125
Bourke <i>v.</i> Alexandra Co.	480
— <i>v.</i> Davis	4
Bowen <i>v.</i> Anderson	513, 514
Bower <i>v.</i> Hill	86, 448, 449, 482, 494, 508, 509, 511, 523
— <i>v.</i> Poate	346, 362, 515
Bowes <i>v.</i> Law	530
Boyce <i>v.</i> Paddington Borough Council	316, 395
Boyle <i>v.</i> Tamlyn	410, 454
Bracken's Settlement, <i>In re</i>	34
Bradbee <i>v.</i> Christ's Hospital	386, 407
Bradburn <i>v.</i> Morris	324
Bradbury <i>v.</i> Grinsell	213
Bradford Corporation <i>v.</i> Ferrand	254
Bradford (Mayor of) <i>v.</i> Pickles	255
Bradley <i>v.</i> Gill	42
Bradshaw <i>v.</i> Eyre	88

	PAGE
Braintree v. Boyton	396
Brazier v. Glasspool	30, 107, 151
Brent v. Haddon	501, 502, 512
Brett v. Clowser	146, 147, 153
Brewery Case	402
Bridewell Hospital v. Ward	201
Brigg v. Thornton	82
Bright v. Walker	188, 193, 203, 213, 214, 215, 221, 457
Briscoe v. Drought	261
Broadbent v. Imperial Gas Co	395
— v. Ramsbotham	255, 265
— v. Wilkes	348
Brock v. Copeland	413
Brocklebank v. Thompson	4, 202
Broder v. Saillard	399, 400, 512, 513
Brook v. Archer	225
— v. Wigg	395
Broomfield v. Williams	15, 84, 85, 106, 107, 124, 132
Brotherton's Estate, <i>In re</i>	10, 34, 459
Brown v. Alabaster	30, 123, 149, 151, 180
— v. Best	438
— v. Mayor and Corporation of Dunstable	281, 397, 403, 451, 521, 522
— v. Nichols	142
— v. Robins	383
— v. Windsor	42, 378, 449
Browne v. Flower	2, 15, 20, 110, 115, 303, 306, 311, 456
Browne's Case (Lady)	270, 455
Brownlow v. Tomlinson	316, 483
Brumfitt v. Roberts	29
Brunton v. Hall	336
Bryan v. Whistler	10, 22, 29, 42, 46, 59, 62, 66, 442
Bryant v. Lefever	237, 307, 309
Brydges v. Kilburne	68, 70, 71
Byrbo Water Co. v. Lester's Lime Co.	278
Buccleuch (Duke of) v. Metropolitan Board of Works	306
— v. Wakefield	347, 348, 350
Buchanan v. Andrew	347, 350
Buckby v. Coles	172, 176, 456
Buckley (R. H.) and Sons, Ltd. v. Buckley (N.) and Sons	419, 434
Bullard v. Harrison	20, 435, 436, 518, 522
Bullers v. Dickinson	477
Bunting v. Hicks	261
Burgess v. Northwick	316, 339
Burling v. Read	502
Burrows v. Lang	24, 84, 107, 124, 131, 228, 272, 273, 279
Burt v. Victoria Co.	514
Bury v. Pope	184, 186
Bush v. Trowbridge Waterworks Co.	458
Buszard v. Capel	34
Butler v. Hunter	516
— v. Manchester, Sheffield and Lincolnshire Rail. Co.	60
Butt v. Imperial Gas Co.	305
Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative Co., Ltd.	347, 348, 350, 352, 353
Butterley v. New Hucknall	348, 353
Butterworth v. West Riding	281, 404
Buxton v. North Eastern Railway	410
Bwlfa and Morthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Water-works Co.	354

C.

CABLE v. Bryant	110, 125, 307, 310, 311, 535
Calcraft v. Thompson	293

	PAGE
Caldwell <i>v.</i> Kilkelly	16, 438
Caledonian Rail. Co. <i>v.</i> Lord Belhaven	112, 353
— <i>v.</i> Sprot	17, 112, 344, 353, 372, 373
— <i>v.</i> Walker's Trustees	458
Campbell <i>v.</i> Mesier	425
— <i>v.</i> Paddington	304
— <i>v.</i> Wilson	187, 222, 230
Campbell Davys <i>v.</i> Lloyd	431, 441, 501
Canadian Pacific Rail. Co. <i>v.</i> Parke	388, 451
— <i>v.</i> Roy	388
Canham <i>v.</i> Fiske	120, 456
Cannon <i>v.</i> Villars	326, 335
Capel <i>v.</i> Buszard	2, 21
Cardiff <i>v.</i> Cardiff	524
Cardigan (Earl of) <i>v.</i> Armitage	27, 170
Carington <i>v.</i> Roots	3
Carlisle (Mayor of) <i>v.</i> Graham	242
Carlisle Café Co. <i>v.</i> Muse	408
Carlyon <i>v.</i> Lovering	195, 197, 281, 285, 347, 348, 403
Carr <i>v.</i> Foster	200, 201, 209, 482, 485
Carstairs <i>v.</i> Taylor	426
Carter <i>v.</i> Williams	82
Cartwright <i>v.</i> Last	302, 534
Catt <i>v.</i> Tourle	82
Cavander <i>v.</i> Bulteel	82
Cavey <i>v.</i> Leadbitter	395, 398
Cawdor (Lord) <i>v.</i> Lewis	68
Cawkwell <i>v.</i> Russell	492
Chadwick <i>v.</i> Marsden	337, 443
— <i>v.</i> Trower	386, 387
Challender <i>v.</i> Royle	528
Chamber Colliery Co. <i>v.</i> Rochdale Canal Co.	355
— <i>v.</i> Hopwood	196, 228, 230, 269, 273
Chandler <i>v.</i> Thompson	288, 306, 470
Chaplin <i>v.</i> Betsworth	4
Chaplin & Co., Ltd., <i>v.</i> Mayor of Westminster	316, 339
Chapman <i>v.</i> Aukland	531
— <i>v.</i> Day	352
Chappell <i>v.</i> Davidson	528
Charles <i>v.</i> Finchley Local Board	397, 492
Chase <i>v.</i> London County Council	397
Chasemore <i>v.</i> Richards	190, 237, 240, 246, 248, 254, 255, 264, 268, 363, 369
Chastey <i>v.</i> Ackland	310, 311, 535
Chauntler <i>v.</i> Robinson	422
Cheeseborough <i>v.</i> Green	424
Cheetham <i>v.</i> Hampson	411, 513
Cherrington <i>v.</i> Abney	469
Chesterfield <i>v.</i> Harris	6, 18, 195
Chichester <i>v.</i> Lethbridge	395
Child <i>v.</i> Douglas	165
— <i>v.</i> Hearn	410
— <i>v.</i> Stenning	86
Chorley Corporation <i>v.</i> Nightingale	392
Christian Smith's Case	513
Christie <i>v.</i> Davey	397
City of London Brewery <i>v.</i> Tennant	294, 295, 301, 307
City of London Commissioners <i>v.</i> Central London Ry.	250
Civil Service Musical Instrument Association <i>v.</i> Whiteman	68, 69, 70
Clancy <i>v.</i> Byrne	153
Clare Hall <i>v.</i> Harding	69, 71
Clark <i>v.</i> Cogge	171, 172, 178
Clarke <i>v.</i> Clark	292, 293, 294, 295, 296, 297, 301
Clavering's Case	68, 60, 72, 76, 346
Clayards <i>v.</i> Dethick	392

	PAGE
Clayton v. Corby	204, 208, 209, 519
Cleaver v. Bacon	396
Clegg v. Hands	82
Clements v. Lambert	88
Clifford v. Hoare	338, 495, 523
— v. Holt	198, 527
Clippens Oil Co., Ltd. v. Edinburgh and District Water Trustees	112, 194, 352
Clowes v. North Staffordshire Potteries Waterworks Co.	525
Coaker v. Willcocks	411
Cocker v. Cowper	36, 46, 59, 62
Codling v. Johnson	86, 187, 220, 448
Colchester (Mayor of) v. Brooke	501, 503
Colchester v. Roberts	333
Colebeck v. Girdlers' Company	375, 407, 419, 422
Coleman v. Foster	3, 48
Coles v. Sims	165
Colliery Co. v. Hopkins	228
Collins v. Castle	83
— v. Slade	312
Collis v. Laugher	199, 290
Colls v. Home and Colonial Stores, Ltd.	198, 200, 202, 223, 229, 289, 290, 293—303, 394, 442, 465, 469, 470, 473, 474, 476, 478, 496, 518, 531, 532, 534
Colwell v. St. Pancras Borough Council	397, 509
Commissioners of French Hoek v. Hugo	244
Commissioners of Sewers v. Glasse	502
Compton v. Richards	126, 129, 163
Consett Waterworks Co. v. Ritson	350, 356
Constable v. Nicholson	22
Cook v. Mayor of Bath	482, 484, 537
Cooke v. Forbes	526
— v. Gill	504
— v. Ingram	111, 339, 341, 484
— v. Midland G. W. R.	392
Cooper v. Barber	258, 262
— v. Crabtree	509, 510, 511
— v. Hubbuck	199, 200, 303, 471, 529
— v. Straker	199, 290
Cope v. Sharpe	16, 437
Corbett v. Hill	418
— v. Jonas	124, 302
Corner v. Champneys	415
Cornish v. Stubbs	36, 61
Corry v. Great Western Railway	410
Cory v. Bristow	3
— v. Greenwich	28
Coryton v. Lithebye	63
Cotching v. Bassett	66, 68, 70, 74
Cotterell v. Griffiths	291, 470
Coulson v. White	526
Courtauld v. Legh	199, 290
Cousens v. Rose	335
Coutts v. Gorham	123, 166
Coventry (Earl of) v. Willes	4
Coverdale v. Charlton	505
Cowen v. Truefitt	340
Cowley v. Mayor, &c. of Sunderland	388
Cowley (Lord) v. Byas	498
Cowling v. Higginson	314, 323, 325, 334, 336
Cowper v. Laidler	525, 529, 531
Cox v. Matthews	119, 262
— v. Mayor of London	504
Crane v. S. Suburban Co.	Add.
Craven (Earl of) v. Pridmore	409

	PAGE
Crisp <i>v.</i> Martin	29, 197
Crofts <i>v.</i> Haldane	409, 459
Cromford Canal Co. <i>v.</i> Cutts	355
Crook <i>v.</i> Corporation of Seaford	68, 69, 70, 71
Crosby <i>v.</i> Alhambra Co., Ltd.	409
— <i>v.</i> Wadsworth	3
Cross <i>v.</i> Lewis	213, 235, 236
Crossley <i>v.</i> Lightowler	160, 250, 252, 280, 401, 403, 404, 443, 485
Crow <i>v.</i> Redhouse	409
Crowder <i>v.</i> Tinkler	395, 536
Crowhurst <i>v.</i> Amersham	418
Crumbie <i>v.</i> Wallsend Local Board	346, 512
Crump <i>v.</i> Lambert	29, 396, 401, 402, 403, 509
Cubitt <i>v.</i> Porter	406, 407
Cuckfield Rural District Council <i>v.</i> Goring	430
Cummins <i>v.</i> Perkins	527
Curriers' Company (The) <i>v.</i> Corbett	157, 161, 293, 311, 471

D.

DAKIN <i>v.</i> Cornish	248
Dalton <i>v.</i> Angus	29, 30, 64, 65, 80, 181, 186, 187, 188, 189, 193, 197, 201, 218, 225, 226, 227, 230, 232, 289, 304, 310, 311, 344, 345, 346, 357, 360, 362, 372, 379, 380, 381, 382, 489, 515
Dalton Overseers <i>v.</i> N. E. Railway	430
Damper <i>v.</i> Bassett	183, 239, 510
Dand <i>v.</i> Kingscote	169, 174, 334, 337, 439
Daniel <i>v.</i> Anderson	100, 135, 220
— <i>v.</i> Ferguson	527
— <i>v.</i> North	210, 213, 233, 234, 236, 511
Daniels <i>v.</i> Davison	82
— <i>v.</i> Potter and Others	392, 519
Dann <i>v.</i> Spurrier	66, 68, 69, 71, 74, 76
Darcy (Lord) <i>v.</i> Askwith	170
Dare <i>v.</i> Heathcote	324, 336
Darley Main Colliery Co. <i>v.</i> Mitchell	346, 382, 512
Dartmouth (Lady) <i>v.</i> Roberts	187
Darwin <i>v.</i> Upton	289, 303
Davenport <i>v.</i> Rylands	531
Daventry District Council <i>v.</i> Parker	430
Davies <i>v.</i> Marshall	38, 123, 460, 471
— <i>v.</i> Sear	68, 70, 76, 82, 146, 160, 162, 171, 173
— <i>v.</i> Stephens	236
— <i>v.</i> Thomas	124, 125
— <i>v.</i> Williams	60, 197, 201, 502
Davis, <i>Re</i>	3
— <i>v.</i> Leicester	83
— <i>v.</i> London and Blackwall Rail. Co.	386
— <i>v.</i> Corporation of Leicester	83
— <i>v.</i> Marrable	298
— <i>v.</i> Town Properties	134, 311
— <i>v.</i> Treharne	347, 348, 349, 350, 351
Dawney <i>v.</i> Dee	29, 523
Dawson <i>v.</i> Duke of Norfolk	225
— <i>v.</i> M'Groggan	192, 193, 195, 231
— <i>v.</i> Midland Railway	410
Day <i>v.</i> Brownrigg	527
De la Warr (Earl) <i>v.</i> Miles	190, 195, 201, 223, 229, 231
Deacon <i>v.</i> South Eastern Rail. Co.	340, 341, 496
Deane <i>v.</i> Clayton	415
Demerara Electric Co., Ltd. <i>v.</i> White	388
Dennaby <i>v.</i> Anson	287
Dent <i>v.</i> Auction Mart Co.	293, 297, 298, 307, 309, 469, 532, 535

	PAGE
Devonshire (Duke of) <i>v.</i> Eglin	65, 71
— <i>v.</i> Pattinson	202, 242
Dewar <i>v.</i> City and Suburban Racecourse Co.	397
Dewell <i>v.</i> Sanders	404
Dewhurst <i>v.</i> Wrigley	262
Dicker <i>v.</i> Popham	298, 531
Dickinson <i>v.</i> Grand Junction Canal Co.	254, 265, 266, 267, 536
— <i>v.</i> Harbottle	302, 311
Dimes <i>v.</i> Petley	501, 503
Dixon <i>v.</i> Caledonian Rail. Co.	355
— <i>v.</i> Great Western Rail. Co.	410
— <i>v.</i> White	347, 348, 349, 352, 353
Dobson <i>v.</i> Blackmore	508, 509
Dodd <i>v.</i> Burchell	157, 169
— <i>v.</i> Holme	226, 260, 371, 372, 386
Doe <i>v.</i> Hilder	481
— <i>v.</i> Keeling	397
— <i>d.</i> Fenwick <i>v.</i> Reed	187, 522
— <i>d.</i> Foley <i>v.</i> Wilson	209
— <i>d.</i> Pring <i>v.</i> Pearsey	409
— <i>v.</i> Williams	284
— <i>v.</i> Wood	16, 62
Doherty <i>v.</i> Allman	536
Donnelly <i>v.</i> Adams	153, 340
Dovaston <i>v.</i> Payne	13, 409
Drake <i>v.</i> Wiglesworth	312
Drew <i>v.</i> New River Co.	389
Drewell <i>v.</i> Towler	26
Drewett <i>v.</i> Sheard	482
Dreyfus <i>v.</i> Peruvian Co.	529
Drury <i>v.</i> Army and Navy Co-operative Supply	408, 409
Dudden <i>v.</i> Guardians of the Clutton Union	261, 278
Dudley, <i>Re</i> Corporation of	112
Dudley Canal Co. <i>v.</i> Grazebrook	353, 355
Dugdale <i>v.</i> Robertson	348, 372, 375
Duncan <i>v.</i> Louch	316, 433
Duncombe <i>v.</i> Randall	438
Duncombe's Case	435
Dungarvan Guardians <i>v.</i> Mansfield	4
Dunn <i>v.</i> Birmingham Canal Co.	388
Dunston <i>v.</i> Neal	395
Durell <i>v.</i> Pritchard	293, 526
Durham and Sunderland Rail. Co. <i>v.</i> Walker	78, 336, 337
— <i>v.</i> Wawn	68, 71
Dutton <i>v.</i> Taylor	172
Dyce <i>v.</i> Lady James Hay	5, 12, 20, 21, 26, 182, 315
Dyers' Co. <i>v.</i> King	298, 480
Dynevor (Lord) <i>v.</i> Tennant	77, 452
Dysart <i>v.</i> Hammerton	194, <i>Add.</i>

E.

EADEN <i>v.</i> Firth	397, 524
Eadon <i>v.</i> Jeffcock	351
Eagle <i>v.</i> Charing Cross Rail. Co.	458
Eardley <i>v.</i> Granville	346
East India Co. <i>v.</i> Vincent	68, 70, 71, 469
East Freemantle (Mayor of) <i>v.</i> Annois	388
Easton <i>v.</i> Isted	200, 290
East Stonehouse Urban Council <i>v.</i> Willoughby Bros., Ltd.	192, 194, 213
Eastwood <i>v.</i> Lever	83
Eaton <i>v.</i> Swansea Waterworks Co.	201, 223, 224
Ecclesiastical Commissioners <i>v.</i> Kino	183, 198, 217, 294, 301, 310, 461, 463, 477

	PAGE
Eeroyd v. Coulthard	242
Eden v. North Eastern Rail. Co.	354
Edlin v. Battaly	71
Edwards v. Halinder	421
— v. Jenkins	4
Egremont (Lord) v. Pulman	433, 508
Eldridge v. Knott	187
Elliot v. North Eastern Railway	112, 345
Elliotson v. Feetham	29, 402, 403
Ellis v. Manchester Carriage Co.	161
— v. Mayor of Bridgnorth	19
— v. Sheffield Gas Consumers' Co.	514
Elmore v. Pirie	530
Elwood v. Bullock	4, 483
Embrey v. Owen	244, 248, 252, 265, 522, 523
Emerson v. Wiley	482
Emsley v. North Eastern Rail. Co.	458
England v. Wall	215
English v. Metropolitan Water Board	255, 260, 388
Ennor v. Barwell	261
Errington v. Blst	396
— v. Metropolitan District Rail. Co.	354
Erskine v. Adeane	409
Esher and Dittons Urban Council v. Marks	430
Espley v. Wilkes	110
Evans v. Manchester, Sheffield and Lincolnshire Rail. Co.	388
— v. Roberts	3
Ewart v. Belfast Guardians	254, 261
— v. Cochrane	112, 121, 122, 157
— v. Graham	195
Ewing v. Colquhoun	248
Exeter v. Devon	286

F.

FAIRBROTHER v. Bury Rural Sanitary Authority	387, 388
Farquhar v. Newbury	313
Farnell v. Coogan	521
Fawcett v. York and N. M. Rail. Co.	410
Fay v. Prentiss	253, 270, 418, 498, 506, 517
Fear v. Morgan	199, 212, 217
Fenton v. Smith	38, 41, 58, 62
Fenwick v. E. London Co.	397
Ferguson v. Wilson	529
Ferrand v. Bingley Urban Council	430
Fewster v. Turner	100, 129
Fillingham v. Wood	409
Finch v. Great Western Rail. Co.	33, 316, 320, 331, 333, 334
Finchley Co. v. Finchley Council	26
Fineux v. Hoveuden	313
Finlison v. Porter	285, 438, 440
Firth v. Bowling Iron Co.	415
Fisher v. Moon	460
Fishmongers' Co. v. East India Co.	291, 305
Fitch v. Rawling	4, 28
Fitzgerald v. Fribank	3, 280
Fitchardings v. Purcell	195, 242
Fleet v. Metropolitan Asylums Board	398
Fleming v. Hislop	395
Fletcher v. Bealey	404, 497
— v. Birkenhead	345
— v. Lancashire and Yorkshire Rail. Co.	354
— v. Rodgers	527
Flight v. Thomas	198, 200, 201, 403

	PAGE
Flynn <i>v.</i> Hart	214, 216, 496
Foley <i>v.</i> Dudley	194
Foli <i>v.</i> Devonshire	304
Ford <i>v.</i> Metropolitan District Railways	148, 458
Formby <i>v.</i> Barker	83, 305, 525
Forster <i>v.</i> Elvert Colliery Co.	346
Foster <i>v.</i> London, Chatham and Dover Rail. Co.	199, 288
— <i>v.</i> Richmond	27
— <i>v.</i> Spooner	170
— <i>v.</i> Warblington Urban Council	12, 202, 404, 505
Fowler <i>v.</i> Sanders	404
Fowlers <i>v.</i> Walker	479
Fox <i>v.</i> Clarke	408
— <i>v.</i> Venables	220
Francis <i>v.</i> Hayward	27, 163, 408, 418
Frechette <i>v.</i> Compagnie Manufacturière de St. Hyacinthe	443, 473
French Hoek <i>v.</i> Hugo	244
Frewen <i>v.</i> Philipps	199, 217, 234
Fritz <i>v.</i> Hobson	242, 316, 339, 395, 531, 537
Frogley <i>v.</i> Lovelace	63, 64
Fullwood <i>v.</i> Fullwood	525

G.

GALE <i>v.</i> Abbot	201, 310, 504
Gandy <i>v.</i> Jubber	513
Gann <i>v.</i> Fishers of Whitstable	242
Gardner <i>v.</i> Hodgson's Kingston Brewery Co., Ltd.	10, 109, 183, 188, 193, 196, 211, 223, 229, 289, 439, 518, 522
Garritt <i>v.</i> Sharp	290, 470, 480
Gaskin <i>v.</i> Balls	83, 513, 527, 529, 530
Gateley <i>v.</i> Martin	227, 374, 379
Gateward's Case	4, 5, 217
Gaunt <i>v.</i> Fynney	397
Gaved <i>v.</i> Martyn	24, 196, 220, 228, 246, 269, 272, 273, 285
Gayford <i>v.</i> Moffatt	168, 169, 173, 216, 220, 327, 386
— <i>v.</i> Nicholls	361, 387, 515
General Estates <i>v.</i> Beaver	194
Geraghty <i>v.</i> McCann	153
Gerard and Beecham, <i>Re</i>	34
Gerard, <i>Re</i> Lord, and London and North Western Rail. Co.	355
Germaine <i>v.</i> London Exhibitions, Ltd.	397
Gerrard <i>v.</i> Cooke	77, 419, 432, 438, 440
Gibbins <i>v.</i> Hungerford	397
Giles <i>v.</i> Walker	418
Gill <i>v.</i> Dickinson	347, 350
— <i>v.</i> Westlake	344
Glamorganshire Canal Navigation Co. <i>v.</i> Nixon's Navigation Co., Ltd.	112
	352, 355
Glasgow (Lord Provost and Magistrates of) <i>v.</i> Farie	354
Glave <i>v.</i> Harding	136
Glossop <i>v.</i> Heston and Isleworth Local Board	397
Glover <i>v.</i> Coleman	201, 225
Godwin <i>v.</i> Schweppes	84, 105, 108, 131
Goldsmid <i>v.</i> Great Eastern Rail. Co.	239
— <i>v.</i> Tunbridge Wells Improvement Commissioners	281, 403, 505
Gonty and Manchester, Sheffield and Lincolnshire Rail. Co., <i>Re</i>	34
Goodhart <i>v.</i> Hyett	28, 269, 433
Goodman <i>v.</i> Gore and Others	307
— <i>v.</i> Mayor of Saltash	5, 182, 194, 211, 225
Goodtitle <i>v.</i> Baldwin	194
Goodwin <i>v.</i> Schwepps	134

	PAGE
Gordon v. Ogilvie	166
Gorton v. Smart	396
Graham v. Campbell	528
Grand Junction Canal Co. v. Shugar	260
Graves v. Burdan	425
Gray v. Bond	28, 210, 233, 236
— v. Pullen	515
Great Laxey Mining Co. v. Clague	346, 347
Great Northern Rail. Co. v. Inland Revenue Commissioners	80, 355
Great Torrington Commons Conservators v. Moore Stevens	242
Great Western Rail. Co. v. Badgworth	10
— v. Bennett	355
— v. Blades	354
— v. Cefn Cribbwr Brick Co.	352
— v. Fletcher	353, 355
— v. Swindon and Cheltenham Rail. Co.	10, 35
— v. Talbot	34, 331, 332
Great Western Rail. Co. of Canada v. Braid	388
Greatrex v. Hayward	24, 271, 277, 279
Greenhalgh v. Brindley	7
Greenslade v. Halliday	263, 443, 501, 502
Greenway v. Hockin	29
Greenwell v. Low Beechburn Coal Co.	346, 351, 382
Greenwood v. Hornsey	463, 479, 528, 530
Greyvensteyn v. Hattingh	286
Griffith v. Blake	528
— v. Clay	289
Grinstead v. Marlowe	220, 518
Grindley v. Booth	396
Grocers' Co. v. Donne	390
Grosvenor Hotel Co. v. Hamilton	2, 15, 112
Grymes v. Peacock	88
Guest v. Milner	496
Gullick v. Tremlett	396
Guy v. West	409
Gwinnell v. Eamer	514
Gwynne v. Drewitt	457

H.

HACKETT v. Baiss	301
Haines v. Taylor	68
Hale v. Oldroyd	468, 482, 485
Hall v. Byron	101
— v. Ewin	82
— v. Lichfield Brewery Co.	80, 310
— v. Lund	111, 122, 156
— v. Norfolk (Duke of)	346, 382
— v. Nottingham	4, 5
— v. Swift	201, 445, 450, 468, 485, 494
Hamelin v. Bannerman	263, 282
Hammer v. Knowles	346, 371, 383
Hamilton (Duke of) v. Graham	16
Hammersmith Rail. Co. v. Brand	388
Hammerton v. Honey	195
Hanbury v. Jenkins	15, 28
Hamner v. Chance	195, 203
— v. Flight	520
Hanna v. Pollock	214, 216, 224, 273, 277, 511
Harber v. Rand	458
Harbridge v. Warwick	196, 198, 209, 238, 239, 289
Hardaker v. Idle District Council	517
Hardcastle v. Shafto	70, 71
— v. South Yorkshire Rail., &c. Co.	392, 395, 413, 415

	PAGE
Harding <i>v.</i> Wilson	110, 111, 495
Hargroves, Aronson & Co. <i>v.</i> Hartopp	425
Harrington (Earl of) <i>v.</i> Corporation of Derby	281, 403
Harris <i>v.</i> De Pinna	27, 197, 198, 290, 309, 311, 418
— <i>v.</i> Drewe	86, 448
— <i>v.</i> Flower & Sons	334, 442, 491
— <i>v.</i> James	514
— <i>v.</i> Jenkins	521, 522
— <i>v.</i> Kinloch	290
— <i>v.</i> Ryding	344, 351, 388, 421, 517
Harrison <i>v.</i> Great Northern Railway	402
— <i>v.</i> Good	397
— <i>v.</i> Muncaster	86
— <i>v.</i> Parker	41
Harrop <i>v.</i> Hirst	4, 253, 285, 313, 404, 523
Hart <i>v.</i> Rogers	<i>Add.</i>
Harvey and L.C.C., <i>Re</i>	458
Harvey <i>v.</i> Walters	28, 270, 469
Harvie <i>v.</i> Rogers	487
Hastings <i>v.</i> Ivall	505
Hastings (Lord) <i>v.</i> North Eastern Rail. Co.	2, 10, 34, 65
Hawkins <i>v.</i> Carbines	435, 495
— <i>v.</i> Rutter	13, 504
— <i>v.</i> Wallis	27
Hawley <i>v.</i> Steele	397
Hayles <i>v.</i> Pease and Partners, Ltd.	163
Haynes <i>v.</i> Ford	239
— <i>v.</i> King	131, 200
Haywood <i>v.</i> Brunswick Building Society	82
Heap <i>v.</i> Hartley	3
Heath <i>v.</i> Bucknall	479
— <i>v.</i> Overseers of Weaverham	430
Heather <i>v.</i> Pardon	397, 404
Hedley <i>v.</i> Fenwick	337
Heigate <i>v.</i> Williams	454
Hendy <i>v.</i> Stephenson	522
Henn's Case	435
Henniker <i>v.</i> Howard	409
Henning <i>v.</i> Burnet	329, 491
Hertfordshire Council <i>v.</i> New River Co.	430
Hervey <i>v.</i> Smith	27, 66, 527
Herz <i>v.</i> Union Bank of London	2, 111, 302, 524
Hetherington <i>v.</i> Galt	417
Hewitt <i>v.</i> Isham	170
Hewlins <i>v.</i> Shippam	10, 35, 36, 38, 39, 46, 57, 59
Hext <i>v.</i> Gill	351, 354
Heywood <i>v.</i> Mallaleau	7, 28
Hide <i>v.</i> Thornborough	261, 378
Higgins <i>v.</i> Betts	297, 299, 393, 533
Higham <i>v.</i> Rabett	314, 324, 336
Hill's Case	502
Hill <i>v.</i> Bedoe	312
— <i>v.</i> Cock	492, 501
— <i>v.</i> Grange	88, 142
— <i>v.</i> Midland Rail. Co.	10, 35
— <i>v.</i> Tottenham Urban Council	517
— <i>v.</i> Tupper	3, 20, 282
Hilton <i>v.</i> Ankesson	409
— <i>v.</i> Earl Granville	347, 348, 527
Hinchcliffe <i>v.</i> Lord Kinnoul	16, 88, 138, 140, 147
Hinde <i>v.</i> Charlton	29
Hindson <i>v.</i> Ashby	242, 287
Hoare <i>v.</i> Dickinson	434
— <i>v.</i> Lewisham	27

	PAGE
Hoare <i>v.</i> Metropolitan Board of Works ...	27, 432
Hobart <i>v.</i> Southend-on-Sea Corporation ...	404
Hobbs, Hart & Co. <i>v.</i> Grover ...	409
Hodder <i>v.</i> Holman ...	333
Hodgkinson <i>v.</i> Ennor ...	280
Hodgson <i>v.</i> Field ...	170, 432, 438
Hogg <i>v.</i> Scott ...	529
Holcroft <i>v.</i> Heel ...	185, 187
Holden <i>v.</i> Tilley ...	458
Holder <i>v.</i> Coates ...	416
Hole <i>v.</i> Barlow ...	398
— <i>v.</i> Sittingbourne and Sheerness Rail. Co. ...	515
Holford <i>v.</i> Acton Urban Council ...	83
— <i>v.</i> Hankinson ...	518
Holker <i>v.</i> Porritt ...	262
Holland <i>v.</i> Deakin ...	455
— <i>v.</i> Worley ...	530
Holliday <i>v.</i> Mayor of Wakefield ...	355, 356, 458
— <i>v.</i> National Telephone Co. ...	515
Hollins <i>v.</i> Verney ...	182, 183, 199, 200, 208, 209, 239, 324
Holloway <i>v.</i> Hill ...	82
Holmes <i>v.</i> Buckley ...	482
— <i>v.</i> Goring ...	14, 174, 176, 452, 456
Holms <i>v.</i> Seller ...	77, 80
Holywell Union <i>v.</i> Halkyn Drainage Co. ...	10, 21, 285
Hopwood <i>v.</i> Scholfield ...	253, 506, 509
Hornby <i>v.</i> Silvester ...	458
Hoskins <i>v.</i> Robins ...	41
Hounsell <i>v.</i> Smyth ...	392, 413, 415
House Property Co. <i>v.</i> H. P. Horsenail & Co. ...	505, 509
Howarth <i>v.</i> Armstrong ...	156, 163, 374, 408
— <i>v.</i> Sutcliffe ...	504
Howell <i>v.</i> King ...	334
Howton <i>v.</i> Frearson ...	172
Hudson <i>v.</i> Cripps ...	83
— <i>v.</i> Maddison ...	505
— <i>v.</i> Tabor ...	431
Hugget <i>v.</i> Miers ...	419, 420, 425
Hughes and Ashley's Contract, <i>In re</i> ...	86
Hughes <i>v.</i> Percival ...	407, 516
Hulbert <i>v.</i> Dale ...	33, 194, 239
Hull (Mayor of) <i>v.</i> Horner ...	187, 190
Humphries <i>v.</i> Brogden ...	344, 361, 378, 386, 388
— <i>v.</i> Cousins ...	396, 433, 451
Huning <i>v.</i> Ferrers ...	71
Hunt <i>v.</i> Peake ...	346, 362, 371, 383, 524
Hurdman <i>v.</i> North Eastern Railway ...	415
Hurst <i>v.</i> Picture Theatre ...	48, 63
Hutchinson <i>v.</i> Copestake ...	471, 472, 479
Hutton <i>v.</i> Hamboro ...	338, 495
— <i>v.</i> London and South Western Rail. Co. ...	458
Hyman <i>v.</i> Van den Bergh ...	193, 200, 461, 473, 488, 489, 497, 521

I.

LOTT <i>v.</i> Wilkes ...	415
Imperial Gas Co. <i>v.</i> Broadbent ...	524, 525
Inchbald <i>v.</i> Robinson ...	397, 504, 505
Ingram <i>v.</i> Morecraft ...	433
Inland Revenue <i>v.</i> Joicey ...	346, 347
Insole <i>v.</i> James ...	250
International Tea Stores <i>v.</i> Hobbs ...	20, 84, 104, 111
Irving <i>v.</i> Turnbull ...	83, 406
Isenberg <i>v.</i> East India House Estate Co. ...	530

	PAGE
Isis, The	520
Ivay v. Hedges	426
Iveson v. Moore	313
Ivimey v. Stocker	220, 273, 455

J.

JACKSON v. Cator	68, 70, 71, 72
— v. Duke of Newcastle	292, 534
— v. Pesked	506, 510, 524
— v. Stacey	313
Jacobs v. Seward	407
Jacomb v. Knight	505
James v. Dods	167, 312, 341
— v. Hayward	495, 502, 503
— v. Plant	14, 88, 97, 135, 143, 454
— v. Stevenson	484
Janson v. Brown	415
Jary v. Barnsley Corporation	112, 356
Jay v. Richardson	82
Jeffries v. Williams	371
Jenkins v. Harvey	184, 188
— v. Jackson	514
Jenks v. Viscount Clifden	346, 512
Jersey (Earl of) v. Neath Poor Law Union	354
Jessel v. Chaplin	533
Jesser v. Gifford	506, 508
John Brothers, &c. Brewery Co. v. Holmes	82
Johnson v. Barnes	195, 202
— v. Clark	5
— v. Willson	36
— v. Wyatt	306, 310, 460, 529, 530
Johnston v. Mayfair Property Co.	408
Johnstone v. Hall	510
Joicey v. North Eastern Rail. Co.	354
Jolly v. Kine	537
Jones v. Bird	388
— v. Chappell	504, 505, 509, 510
— v. Consolidated Collieries	Add.
— v. Dorothea	2
— v. Flint	3, 21, 55
— v. Llanrwst	250, 280, 495, 507, 508, 509, 523, 525
— v. Percival	340
— v. Powell	395, 396, 498
— v. Price	206
— v. Pritchard	16, 27, 373, 375, 408, 419, 432, 433, 437, 450
— v. Read	407
— v. Royal Canal Co.	67
— v. Simes	512
— v. Tankerville	62, 63, 64
— v. Tapling	471, 480
— v. Watts	10
— v. Williams	502
Jorden v. Attwood	171, 178
Jordeson v. Sutton, Southcoates and Drypool Gas. Co.	199, 216, 218, 260
	289, 344, 345, 388, 531
Jordin v. Crump	414, 415
Judge v. Lowe	229

K.

KAY v. Oxley	96, 100, 101, 113, 146, 147
Keates v. Lyon	83
Keeble v. Hickeringill	506

	PAGE
Keeble <i>v.</i> Poole	527
Keith <i>v.</i> Twentieth Century Club...	335
Kelk <i>v.</i> Pearson	199, 293, 294, 295, 302, 527, 534
Kemp <i>v.</i> Sober	397
Kempston <i>v.</i> Butler	407
Kennedy <i>v.</i> De Trafford	407
Kenney <i>v.</i> Browne	68
Kensit <i>v.</i> Great Eastern Railway ...	3, 6, 19, 29, 246, 251, 253, 283, 284, 449, 523
Keppel <i>v.</i> Bailey	20
Kerrison <i>v.</i> Smith	61
Kettlewell <i>v.</i> Watson	82
Key <i>v.</i> Neath Rural District Council	88, 90, 124
Keymer <i>v.</i> Summers	187
Kiddle <i>v.</i> Lovett	515
Kidgill <i>v.</i> Moor	495, 506, 509, 511
Kieffer <i>v.</i> Le Seminaire de Quebec	513
Kilgour <i>v.</i> Gaddes	14, 77, 211, 212, 216, 220, 223, 235, 453
Kine <i>v.</i> Jolly	297, 298, 299, 531
King <i>v.</i> Dickeson	83
Kinloch <i>v.</i> Nevile	228, 518, 520
Kirby <i>v.</i> Chessum	509
— <i>v.</i> Harrogate School Board	458
Kitts <i>v.</i> Moore	527
Knight <i>v.</i> Fox	515
— <i>v.</i> Gardner	396
— <i>v.</i> Isle of Wight Electric Light and Power Co.	397
— <i>v.</i> Pursell	409
— <i>v.</i> Simmonds	83
Knowles <i>v.</i> Richardson	305
Knowles & Sons <i>v.</i> Lancashire and Yorkshire Rail. Co.	355
Knox <i>v.</i> Sansom	338, 439
Kooystra <i>v.</i> Lucas	88, 91
Krehl <i>v.</i> Burrell	530
Kynoch <i>v.</i> Rowlands	409

L.

LADYMAN <i>v.</i> Grave	183, 199, 200, 216, 220, 239, 457
Laing <i>v.</i> Whaley	517
Laird <i>v.</i> Birkenhead Rail. Co.	68, 69, 70, 73
— <i>v.</i> Briggs	205, 206, 207, 505
Lambton <i>v.</i> Mellish	397, 401, 513
Lancashire Co. <i>v.</i> Manchester	26
Lancaster <i>v.</i> Eve	28
Lane <i>v.</i> Capsey	495, 501, 502
— <i>v.</i> Dixon	27
— <i>v.</i> Newdigate	256
Lanfranchi <i>v.</i> Mackenzie	302
Langford <i>v.</i> Woods	358
Langley <i>v.</i> Hammond	91, 94, 96, 97, 100, 101, 144, 146, 147, 153
Latham <i>v.</i> Johnson	3, 392
Laughton <i>v.</i> Ward	334
Lawrence <i>v.</i> Horton	527, 530
— <i>v.</i> Jenkins	410, 411
— <i>v.</i> Obee	402, 463
Lawson <i>v.</i> Langley	201, 521
Lawton <i>v.</i> Ward	334
Laybourn <i>v.</i> Gridley	163, 408, 418
Lazarus <i>v.</i> Artistic Photographic Co.	302
Leconfield <i>v.</i> Lonsdale	28, 193, 249, 263, 404
Lee <i>v.</i> Riley	410
— <i>v.</i> Stevenson	285, 442, 494
Lee Conservators <i>v.</i> Button	171

	PAGE
Leech v. Schweder	2, 14, 35, 86, 294, 302, 534
Leeds (Duke of) v. Earl of Amherst	69
Leeds v. Shakerly	402
Leigh v. Dickeson	407
Le Lievre v. Gould	386
Lemaitre v. Davis	29, 197, 217, 227, 374, 379
Lemmon v. Webb	27, 61, 404, 418, 502
Lennig v. Ocean City Association	111
Lewis v. Meridith	15, 272
— v. Price	187
— v. Ronald	425
Lewis and Salome v. Charing Cross, Euston and Hampstead Railway	409
Liford's Case	16, 170, 432, 437
Liggins v. Inge	38, 43, 59, 62, 460, 463
Lilleywhite v. Trimmer	536
Linchan v. Deeble	511
Lipman v. Pullman	397
List v. Tharp	409
Littledale v. Lonsdale (Earl of)	261, 344
Liverpool (Mayor of) v. Chorley	537
Livett v. Wilson	187, 522
Llandudno Urban District Council v. Woods	526
Lockwood v. Wood	5
Lodie v. Arnold	502, 503
Logan v. Burton	458
London and Blackwall Co. v. Cross	526
London and Brighton Rail. Co. v. Truman	402, 536
London and North Western Railway v. Evans	62, 112, 352
— v. Fobbing	431
London and South Western Rail. Co. v. Gomm	7, 82, 305
London (Mayor of) v. Bolt	537
— v. Pewterers' Co.	229
London (Corporation of) v. Riggs	168, 171, 174, 177, 180, 325
London County Council v. Allen	13, 305
London School Board v. Smith	458
London Taverns Co. v. Worley	339
London, Tilbury and Southend Rail. Co. and Trustees of the Gowers Walk Schools, <i>Re</i>	210, 458, 479
Long Eaton Recreation Grounds, Ltd. v. Midland Rail. Co.	458
Lonsdale (Earl of) v. Nelson	499
Lord v. Commissioners of City of Sidney	242, 250
Loring v. Bacon	422, 425
Love v. Bell	163, 348, 349, 350, 352, 353
— v. Piggott	506
Lovell v. Smith	340, 459, 484
Low v. Innes	80
Lowe v. Adams	48, 61
— v. Carpenter	200, 209
Lowry v. Crowthers	229
Lucy v. Bawden	425
Luscombe v. Steer	395
Luttrell's Case	329, 444, 461, 465, 469, 470
Lyde v. Barnard	207
Lyell v. Hothfield	195, 225, 231
Lyme Regis (Mayor of) v. Henley	430, 431
Lyon v. Fishmongers' Co.	242, 250, 287, 316, 339
Lyons v. Gulliver	397
Lyttelton Times Co., Ltd. v. Warners, Ltd.	2, 404

M.

MABERLY v. Dowson	25, 198
Macclesfield (Highway Board of) v. Grant	419, 428, 430
Macey v. Metropolitan Board of Works	458

	PAGE
Mackey <i>v.</i> Scottish Widows' Fund	298, 302, 528
Macnaghten <i>v.</i> Baird	152, 175, 216, 220
Magor <i>v.</i> Chadwick	272, 276, 280
Major <i>v.</i> Park Lane Co. ... ..	... 408
Mallam <i>v.</i> Rose ... ..	... <i>Add.</i>
Mallory's Case ... ..	... 53
Malone <i>v.</i> Harris ... ..	... 39
— <i>v.</i> Laskey ... ..	... 505
Manchester Corporation <i>v.</i> New Moss Colliery, Ltd. ... ..	... <i>Add.</i> , 353, 356, 371
Manchester (Mayor of) <i>v.</i> Lyons ... ..	... 459
Manchester, Sheffield and Lincolnshire Rail. Co. <i>v.</i> Anderson ... ..	... 458
— <i>v.</i> Wallis ... ..	... 410
Mander <i>v.</i> Falcke ... ..	... 82
Manley <i>v.</i> The St. Helens Canal, &c. Co. ... ..	... 388
Manners (Lord) <i>v.</i> Johnson ... ..	... 306
Manning <i>v.</i> Wasdale ... ..	... 22, 28, 195
Mansell <i>v.</i> Valley Co. ... ..	... 241
Marfell <i>v.</i> South Wales Railway ... ..	... 410
Markham <i>v.</i> Paget ... ..	... <i>Add.</i>
Marshall <i>v.</i> Borrowdale ... ..	... 27
— <i>v.</i> Taylor ... ..	... 409
— <i>v.</i> Uleswater ... ..	... 316, 339
Martin <i>v.</i> Goble ... ..	... 299, 469
— <i>v.</i> Headon ... ..	... 293, 297, 473
— <i>v.</i> Nutkin ... ..	... 535
— <i>v.</i> Price ... ..	... 525, 529, 531
Martyr <i>v.</i> Lawrence ... ..	... 102, 418
Mason <i>v.</i> Hill ... ..	... 251, 252, 256, 262, 273
— <i>v.</i> Shrewsbury and Hereford Rail. Co. ... ..	... 24, 230, 262, 263, 279, 513
Massey <i>v.</i> Goyder ... ..	... 378, 387
Master <i>v.</i> Hansard ... ..	... 83
Masters <i>v.</i> Pollie ... ..	... 416
Mathes <i>v.</i> King ... ..	... 512
Matson <i>v.</i> Baird ... ..	... 413
Matthieson <i>v.</i> Pollock ... ..	... 426
Matts <i>v.</i> Hawkins ... ..	... 406
Maxey <i>v.</i> Great Northern Railway ... ..	... 286
Maxfield <i>v.</i> Burton ... ..	... 82
May <i>v.</i> Belleville ... ..	... 64, 78, 101
Mayfair Property Co. <i>v.</i> Johnston ... ..	... 407, 510
Mayor and Corporation of Carlisle <i>v.</i> Graham ... ..	... 242
Mayor and Councillors of East Freemantle <i>v.</i> Annois ... ..	... 388
Mayor of Bradford <i>v.</i> Pickles ... ..	... 355
Mayor of Colchester <i>v.</i> Brooke ... ..	... 501, 503
Mayor of Hull <i>v.</i> Horner ... ..	... 187, 190
Mayor of Liverpool <i>v.</i> Chorley Waterworks Co. ... ..	... 537
Mayor of London <i>v.</i> Bolt ... ..	... 537
— <i>v.</i> Pewterers' Co. ... ..	... 229
Mayor of Lyme Regis <i>v.</i> Henley ... ..	... 430, 431
Mayor of Manchester <i>v.</i> Lyons ... ..	... 459
Mayor of New Windsor <i>v.</i> Stovell ... ..	... 443
McCartney <i>v.</i> Londonderry and Lough Swilly Railway ... ..	... 244, 245, 246, 249, 252, 253, 273, 283, 284, 501, 523
McEvoy <i>v.</i> Great Northern Railway ... ..	... 24, 273, 279
McGlone <i>v.</i> Smith ... ..	... 248, 253
McIntyre <i>v.</i> McGavin ... ..	... 281, 443
McKinnon <i>v.</i> Penson ... ..	... 431
McLean <i>v.</i> McKay ... ..	... 305
McManus <i>v.</i> Cooke ... ..	... 10, 64
McMartin <i>v.</i> Hannay ... ..	... 425
McNab <i>v.</i> Robertson ... ..	... 285
Medway <i>v.</i> Rowney ... ..	... 244, 249
Mellor <i>v.</i> Walmsley ... ..	... 111, 250
— <i>v.</i> Watkins ... ..	... 36, 61

	PAGE
Menzies <i>v.</i> Breadalbane (No. 1)	242
— <i>v.</i> Breadalbane (No. 2)	167
— <i>v.</i> The Marquis of Breadalbane	286
— <i>v.</i> Macdonald	86
Mercer <i>v.</i> Denne	45, 202, 203, 315
Merivale <i>v.</i> Exeter	412
Mersey Docks Trustees <i>v.</i> Gibbs	388
Mersey and Irwell Navigation <i>v.</i> Douglas	523
Merttens <i>v.</i> Hill	194
Metcalfe <i>v.</i> Hetherington	388
Metropolitan Association, The, <i>v.</i> Petch	506, 508, 512
Metropolitan Asylum District <i>v.</i> Hill	388, 398, 536
Metropolitan Board <i>v.</i> London and North Western Railway	443
Metropolitan Board of Works <i>v.</i> Metropolitan Rail. Co.	112
Metropolitan Rail. Co. <i>v.</i> Fowler	9, 10, 14, 21, 27, 217, 453
— <i>v.</i> Great Western Rail. Co.	340
Mexborough (Earl of) <i>v.</i> Bower	527
Micklethwaite <i>v.</i> Newlay Bridge Co.	242
Middleton <i>v.</i> Clarence	27
Midgley <i>v.</i> Richmond	337
Midland Rail. Co. <i>v.</i> Checkley	112, 354, 356
— <i>v.</i> Great Western Rail. Co.	35
— <i>v.</i> Gribble	86, 448, 485
— <i>v.</i> Haunchwood Brick and Tile Co.	354
— <i>v.</i> Miles	169, 170, 175, 180, 355
— <i>v.</i> Robinson	354
— <i>v.</i> Wright	26
Mikes <i>v.</i> Caly	517
Miles <i>v.</i> Tobin	80, 82
Mill <i>v.</i> New Forest Commissioners	187, 218
Millbourne <i>v.</i> Lyons	13, 305
Miller <i>v.</i> Hancock	169, 420, 425
Millichamp <i>v.</i> Johnson	5
Mills <i>v.</i> Colchester	223
Milner's Safe Co., Ltd. <i>v.</i> Great Northern and City Rail. Co.	36, 131, 151, 325, 442, 491
Miner <i>v.</i> Gilmour	244, 252
Mitcalfe <i>v.</i> Westaway	3, 77, 335
Mitchell <i>v.</i> Cantrill	199, 200, 217
— <i>v.</i> Mayor of Rome	372
Mogul Steamship Co. <i>v.</i> McGregor, Gow & Co.	525, 528
Mold <i>v.</i> Wheatcroft	68, 70, 71
Monk <i>v.</i> Butler	40
Monmouthshire Canal Co. <i>v.</i> Harford	182, 222, 228, 229, 519
Montgomerie <i>v.</i> Wallace-James	4
Moody <i>v.</i> Steggles	27, 135, 262
Moore <i>v.</i> Browne	402, 494
— <i>v.</i> Hall	298, 469
— <i>v.</i> Rawson	32, 80, 288, 289, 310, 363, 444, 463, 464, 480, 481
— <i>v.</i> Webb	197, 403
Morant <i>v.</i> Chamberlin	483
Moreland <i>v.</i> Richardson	22, 29, 66
Morgan <i>v.</i> Fear	Add., 199, 217, 234, 235
Morland <i>v.</i> Cook	80, 82, 160
Morley <i>v.</i> Clifford	195
— <i>v.</i> Pragnell	396
Morrice <i>v.</i> Baker	497
Morris <i>v.</i> Edgington	88, 139, 143, 169, 177, 179, 182
Moseley <i>v.</i> Bland	310
Mostyn <i>v.</i> Atherton	261
Mott <i>v.</i> Shoolbred	404, 508, 509, 510
Mounsey <i>v.</i> Ismay	4, 5, 9, 12, 202, 313
Mulliner <i>v.</i> Midland Rail. Co.	34
Mumford <i>v.</i> Oxford, Worcestershire and Wolverhampton Rail. Co.	509, 510

	PAGE
Munday <i>v.</i> S. Metropolitan Co.	513
Mundy <i>v.</i> Duke of Rutland	351, 353
Murchie <i>v.</i> Black	132
Murgatroyd <i>v.</i> Robinson	281, 403
Murly <i>v.</i> McDermott	406
Murray <i>v.</i> Duna	305
— <i>v.</i> Hall	407
— <i>v.</i> East India Co.	186
Muskett <i>v.</i> Hill	3
Myers <i>v.</i> Catterson	123, 134, 199, 290

N.

NATHAN <i>v.</i> Rouse	434
National Guaranteed Manure Co. <i>v.</i> Donald	187, 220, 453
National Provincial Plate Glass Insurance Co. <i>v.</i> Prudential Assurance Co.	462, 475, 530
Neaverson <i>v.</i> Peterborough Rural District Council	187, 192, 218, 239
Neill <i>v.</i> Devonshire	202
Nelson <i>v.</i> Liverpool Co.	514
New Moss Colliery Co. <i>v.</i> Manchester, Sheffield and Lincolnshire Rail. Co.	356
New River Co. <i>v.</i> Johnson	255
New Sharlston Collieries Co. <i>v.</i> Westmoreland (Earl of)	349, 352, 353
New Windsor (Mayor of) <i>v.</i> Stovell	443
New Windsor Corporation <i>v.</i> Taylor	325, 459
Newcomen <i>v.</i> Coulson	33, 86, 330, 334, 337, 432, 439, 448
Newson <i>v.</i> Pender	473, 479, 527
Nicholas <i>v.</i> Chamberlain	116, 123, 142, 154, 162, 163, 432
Nicholls <i>v.</i> Nicholls	100, 131, 150
Nicol <i>v.</i> Beaumont	495
Neild <i>v.</i> London and North Western Railway	286
Nigeria <i>v.</i> John Holt	20, 26, 27
Nisbet and Potts' Contract, <i>In re</i>	13, 29, 82, 83, 305
Nitro-Phosphate and Odam's Chemical Manure Co. <i>v.</i> London and St. Katharine Dock Co.	431
Nixon <i>v.</i> Tynemouth	513
Norbury <i>v.</i> Meade and Others	459, 487
Norbury (Lord) <i>v.</i> Kitchen	244
Norfolk (Duke of) <i>v.</i> Arbuthnot	190, 198, 489, 522
Normanton Gas Co. <i>v.</i> Pope	112
Norris <i>v.</i> Baker	415
North British Rail. Co. <i>v.</i> Elliot	6, 24, 277, 344, 373, 524
— <i>v.</i> Hastings	337
— <i>v.</i> Park Yard Co.	11, 17, 35, 90
— <i>v.</i> Turners, Ltd	112, 354, 373
North London Rail. Co. <i>v.</i> Great Northern Rail. Co.	527
North Shore Rail. Co. <i>v.</i> Pion	242, 250, 257
Northam <i>v.</i> Hurley	60, 80, 253, 285, 449, 523
Norton <i>v.</i> London and North Western Rail. Co.	409
Nottingham Patent Brick and Tile Co. <i>v.</i> Butler	83
Nuneaton Local Board <i>v.</i> General Sewage Co.	535
Nuttall <i>v.</i> Bracewell	244

O.

OAKLEY <i>v.</i> Adamson	80
Odell <i>v.</i> Cleveland	426
Officers of State <i>v.</i> Earl of Haddington	225
Offin <i>v.</i> Rochford Rural District Council	392
Onley <i>v.</i> Gardiner	182, 183, 200, 204, 206, 488, 519
Orf <i>v.</i> Payton	409
Original Hartlepool Collieries Co. <i>v.</i> Gibb	242, 287, 495

	PAGE
Ormerod <i>v.</i> Todmorden Mill Co. ...	246, 248, 251, 252, 253, 283, 397, 523
Orr-Ewing <i>v.</i> Colquhoun ...	242, 246, 252, 286, 287
Osborn <i>v.</i> Bradley ...	305
— <i>v.</i> Wise ...	335
Outram <i>v.</i> Maude ...	239
Owen <i>c.</i> Davies ...	249

P.

PACKER <i>v.</i> Welsted ...	172, 178, 179
Paddington <i>v.</i> Att.-Gen. ...	199
Palk <i>v.</i> Shinner ...	204, 205, 206, 209, 236, 509, 511
Palmer <i>v.</i> Fleshers ...	119, 360
— <i>v.</i> Flessier ...	119
— <i>v.</i> Fletcher ...	119, 127, 128, 154, 155
— <i>v.</i> Guadagni ...	522
— <i>v.</i> Persse ...	242
Parker <i>v.</i> First Avenue Hotel Co. ...	301
— <i>v.</i> Foote ...	303
— <i>v.</i> Mitchell ...	200
— <i>v.</i> Smith and Others ...	291, 292, 294, 295
— <i>v.</i> Staniland ...	3
— <i>v.</i> Stanley ...	302, 530
Partridge <i>v.</i> Scott ...	226, 258, 358
Patman <i>v.</i> Harland ...	82
Patrick <i>v.</i> Colerick ...	58
Pattison <i>v.</i> Gilford ...	498
Payne <i>v.</i> Brigham ...	167
— <i>v.</i> Shedden ...	201, 482
Pearson <i>v.</i> Spencer ...	36, 62, 88, 135, 144, 147, 149, 151, 152, 157, 169, 178, 179, 180
Pearson's Will, <i>In re</i> ...	27, 34
Pease <i>v.</i> Courtney ...	34
Peck and the London School Board, <i>In re</i> ...	85
Pensel and Wilson <i>v.</i> Tucker ...	3, 7
Pendarves <i>v.</i> Munro ...	479
Pennington <i>v.</i> Brinsop Hall Coal Co. ...	253, 525
Penny, <i>In re</i> ...	306
— <i>v.</i> Wimbledon Urban District Council ...	517
Penruddock's Case ...	21, 402, 497, 502, 512
Penwarden <i>v.</i> Ching ...	188, 289
Perry <i>v.</i> Eames ...	197, 198, 239, 303
— <i>v.</i> Fitzhowe ...	60, 484, 499, 501, 502
Peru <i>v.</i> Dreyfus ...	528
Peter <i>v.</i> Daniel ...	19, 28, 411, 432, 441, 498, 508
Petty <i>v.</i> Parsons ...	338, 339, 494, 496
Peyton <i>v.</i> Mayor of London ...	120, 375, 407
Pheysey <i>v.</i> Vicary ...	30, 36, 138, 139, 142, 147, 169, 454, 455
Philipps <i>v.</i> Halliday ...	29, 188, 192, 194, 197
Phillimore <i>v.</i> Watford ...	443
Phillips <i>v.</i> Low ...	36, 124, 131, 152
— <i>v.</i> Thomas ...	498, 514
— <i>v.</i> Treeby ...	449, 495, 535
Philpot <i>v.</i> Bath ...	28
Pickard <i>v.</i> Smith ...	515
Pickering <i>v.</i> Rudd ...	418, 498
Piggot <i>v.</i> Eastern Counties Rail. Co. ...	388
Piggott <i>v.</i> Stratton ...	305
Pilling <i>v.</i> Armitage ...	68, 71
Pinchin <i>v.</i> London and Blackwall Rail. Co. ...	35
Pinnington <i>v.</i> Galland ...	16, 162, 168, 173, 179
Pirie <i>v.</i> Kintore (Earl of) ...	197, 249, 449
Pitts <i>v.</i> Gaince and Another ...	517

	PAGE
Plant <i>v.</i> James	88, 93
Plasterers' Co. <i>v.</i> Parish Clerks' Co.	201, 229
Player <i>v.</i> Jenkins	398
Pledge <i>v.</i> Pomfret	521
Plummer <i>v.</i> Wellington	62
Polden <i>v.</i> Bastard	28, 30, 103, 123, 135, 269
Pollard <i>v.</i> Gare	84, 85, 107, 124, 138
Polsue <i>v.</i> Rushmer	393, 394
Pomfret <i>v.</i> Ricroft	20, 86, 141, 419, 420, 421, 422, 432
Ponting <i>v.</i> Noakes	418
Poole <i>v.</i> Huskinson	313
Popplewell <i>v.</i> Hodkinson	112, 344, 345
Portsmouth <i>v.</i> London, Brighton and South Coast Railway	6, 7, 250
Potter <i>v.</i> North	188
Potts <i>v.</i> Smith	86, 290, 305
Poulton <i>v.</i> Moore	459
Pountney <i>v.</i> Clayton	355
Powell <i>v.</i> Butler	273
— <i>v.</i> Salisbury	410
— <i>v.</i> Thomas	68, 70, 71
— <i>v.</i> Thorndike	426
Pratt <i>v.</i> Hillman	408
Prescott <i>v.</i> Phillips	262
Presland <i>v.</i> Bingham	199, 201
Preston <i>v.</i> Luck	528
— <i>v.</i> Norfolk and Eastern Counties Rail. Cos.	513
Pretty <i>v.</i> Bickman	514
Priest <i>v.</i> Manchester	Add.
Pringle <i>v.</i> Wernham	291
Prinsep <i>v.</i> Belgravia Estate, Ltd.	7, 35, 66, 124
Prior <i>v.</i> Southwark's Case	506
Proctor <i>v.</i> Harris	392
— <i>v.</i> Hodgson	169, 176, 177, 522
Proud <i>v.</i> Bates	170, 347, 348, 351, 353
— <i>v.</i> Hollis	501
Puckett and Smith's Contract, <i>In re</i>	1, 7
Pulbach <i>v.</i> Woodman	122, 403, 405
Pullin <i>v.</i> Deffel	316, 494
Pye <i>v.</i> Mumford	27, 204, 208, 209, 518, 519
Pyer <i>v.</i> Carter	30, 137, 155, 157, 158, 159, 160, 161, 162, 163, 270
Pym <i>v.</i> Harrison	3

Q.

QUARMAN <i>v.</i> Burnett	515, 516
Quicke <i>v.</i> Chapman	33, 84, 108, 124, 131, 134

R.

RACE <i>v.</i> Ward	4, 22, 28, 187, 269, 458, 498
Radcliffe <i>v.</i> Hayes	3, 35
Raikes <i>v.</i> Townsend	500
Raine <i>v.</i> Alderston	510
Rameshur Pershad Narain Singh <i>v.</i> Koonj Behari Pattuk	23, 29, 246, 272, 273
Ramsay <i>v.</i> Blair	27, 170
Ramsden <i>v.</i> Dyson	67, 68, 71
Ramsgate Corporation <i>v.</i> Debling	202
Ramus <i>v.</i> Southend Board	316, 339
Randall <i>v.</i> Hall	338
Randfield <i>v.</i> Randfield	501
Rangeley <i>v.</i> Midland Rail. Co.	13, 15
Rankett's Case	398

	PAGE
Raper v. Fortescue...	479
Rapier v. London Tramways Co.	388, 396
Rapley v. Smart ...	396
Rawstron v. Taylor ...	253, 254, 264, 285, 523
Ray v. Hazeldine ...	163, 169, 170, 174
Rea v. Sheward ...	503
Read v. Brookman ...	187, 522
Reddie v. London and North Western Rail. Co.	392, 515
Reg. v. Barker ...	430
— v. Brown ...	332
— v. Buceleugh ...	430
— v. Bucknell ...	430
— v. Chorley ...	316, 482, 484, 486
— v. Cluworth ...	171
— v. Essex ...	431
— v. Inhabitants of the County of Wilts ...	430
— v. Lincoln ...	430
— v. London and North Western Rail. Co.	354
— v. Manners Sutton ...	430
— v. Metropolitan Board of Works ...	255
— v. Neville ...	404
— v. Oldreeve ...	436
— v. New Forest ...	436
— v. Pappineau ...	396
— v. Pedly ...	513
— v. Poulter ...	458
— v. Ramsden ...	430
— v. St. Pancras Assessment Committee ...	3, 27
— v. Tindall ...	494
— v. U. K. Electric Co.	338
Reignolds v. Edwards ...	175, 313
Reilly v. Booth ...	21, 27, 338, 408
Reinhardt v. Mentasti ...	396, 400
Remfry v. Natal ...	284, 285
Renals v. Cowlshaw ...	83
Renshaw v. Bean ...	471, 472, 473, 479
Rex v. Commissioners of the Pagham Level ...	286, 385, 389
— v. Hatfield ...	430, 458
— v. Horndon-on-the-Hill ...	36, 56, 58, 62
— v. Inhabitants of Hermitage ...	454
— v. Jolliffe ...	189
— v. Llandilo ...	412
— v. Neill ...	395
— v. Pierce ...	396
— v. Rosewell ...	500, 501
— v. St. Giles ...	430
— v. Skinner ...	430
— v. Surrey ...	195
— v. Trafford ...	286
Reynolds v. Clarke ...	270
— v. Moore ...	335
Rhodes v. Bullard ...	442
Rich v. Basterfield ...	513
Richard and the Great Western Rail. Co., <i>In re</i> ...	354
Richards v. Fry ...	200, 206, 488, 521
— v. Harper ...	3, 347
— v. Jenkins ...	371
— v. Rose ...	120, 137, 138, 156, 162, 163, 372, 374, 375, 408
Richardson v. Graham ...	183, 457
— v. Pond ...	28
Ricketts v. East and West India Dock, &c. Rail. Co. ...	410
Rider v. Smith ...	420, 518
Ridge v. Midland Co. ...	286
Rigby v. Bennett ...	132, 373

	PAGE
Ritger <i>v.</i> Parker	454
Rivers <i>v.</i> Adams	194, 230
Riviere <i>v.</i> Bower	154
Robbins <i>v.</i> Jones	430, 513
Roberts <i>v.</i> Fellowes	28, 198, 228, 263, 264
— <i>v.</i> Gwyrfai District Council	246, 249, 252, 253, 523
— <i>v.</i> Haines	348, 351
— <i>v.</i> James	192, 212, 213, 231
— <i>v.</i> Karr	110, 111, 339
— <i>v.</i> Macord	290
— <i>v.</i> Richards	246, 273
— <i>v.</i> Rose	501, 502
Robertson <i>v.</i> Gauntlett	435
Robins <i>v.</i> Barnes	113, 117
Robinson <i>v.</i> Grave	111, 123
— <i>v.</i> Kilvert	86, 112
— <i>v.</i> Lord Byron	524, 526
Robinson's Settlement Trusts, <i>In re</i>	354
Robson <i>v.</i> Edwards	199, 217
— <i>v.</i> Whittingham	293, 297
Rochdale Canal Co. <i>v.</i> King	66, 68, 69, 70, 71, 72, 203, 253, 523
— <i>v.</i> Radcliffe	187, 218
Roe <i>v.</i> Siddons	101, 111, 453
Roffey <i>v.</i> Henderson	3, 48
Rogers <i>v.</i> Hosegood	82, 83, 305
Rolle <i>v.</i> Whyte	28, 201, 225, 249, 263, 404
Rooth <i>v.</i> Wilson	410
Rosewell <i>v.</i> Prior	402, 513
Roskell <i>v.</i> Whitworth	524
Rouse <i>v.</i> Bardin	330
Rowbotham <i>v.</i> Wilson	16, 17, 27, 29, 80, 81, 90, 289, 346, 347, 350, 353, 361
Rowe <i>v.</i> London School Board	10
Royal Mail <i>v.</i> George	29, 403
Ruabon Brick and Terra Cotta Co. <i>v.</i> Great Western Rail. Co.	354, 355
Ruck <i>v.</i> Williams	388
Rudd <i>v.</i> Bowles	111, 153
Rugby Cement Co. <i>v.</i> London and North Western Railway	354
Rumble <i>v.</i> Heygate	179
Rumsey <i>v.</i> Rawson	41
Runcorn <i>v.</i> Doe d. Cooper	212
Rundle <i>v.</i> Hearle	430
Ruscoe <i>v.</i> Grounsell	200
Rushmer <i>v.</i> Polsue and Alfieri, Ltd.	297, 394, 397, 401, 404
Russell <i>v.</i> Devon	431
— <i>v.</i> Harford	130
— <i>v.</i> Shenton	513
— <i>v.</i> Watts	69, 129, 163
Rust <i>v.</i> Low	410
— <i>v.</i> Victoria Co.	431, 507, 508
Ryall <i>v.</i> Kidwell	514
Ryder <i>v.</i> Bentham	526
Rylands <i>v.</i> Fletcher	415
Rymer <i>v.</i> McLroy	11, 17, 35, 77, 80, 134
Ryppon <i>v.</i> Bowles	514

S.

SADLER <i>v.</i> South Western Railway	513
Sainsbury <i>v.</i> Matthews	3
St. Helens Chemical Co. <i>v.</i> St. Helens	395, 397
St. Helens Smelting Co. <i>v.</i> Tipping	394, 395, 399, 401
St. John <i>v.</i> Moody	518
St. Mary, Newton <i>v.</i> Jacobs	21

	PAGE
Salaman <i>v.</i> Glover	131, 460
Salisbury (Marquis of) <i>v.</i> Gladstone	5, 348
Salmon <i>v.</i> Bensley	512
Salt Union <i>v.</i> Brunner, Mond & Co.	255, 260, 345
Salters' Co. <i>v.</i> Jay	303
Salvin <i>v.</i> North Brancepeth Coal Co.	395
Sampson <i>v.</i> Hoddinott	244, 248, 252, 262, 498
— <i>v.</i> Smith	396, 537
Sanders-Clark <i>v.</i> Grosvenor Mansions Co., Ltd.	401
Sanders' Settlement, <i>In re</i>	10
Sanderson <i>v.</i> Mayor of Berwick-upon-Tweed	86
Sandford <i>v.</i> Clarke	514
Sandwich (Earl of) <i>v.</i> Great Northern Rail. Co.	246
Sandys <i>v.</i> Trefusis	518
Sarch <i>v.</i> Blackburn	413
Saunders <i>v.</i> Mose	333
— <i>v.</i> Newman	252, 443, 468
Saundeys <i>v.</i> Oliff	88
Saxby <i>v.</i> Manchester and Sheffield Rail. Co.	514
Sayers <i>v.</i> Collyer	83, 530
Scots Mines Co. <i>v.</i> Leadhills Mines Co.	261
Scott <i>v.</i> Firth	399
— <i>v.</i> Pape	198, 289, 290, 294, 296, 464, 470, 473, 477, 478
— <i>v.</i> Shepherd	384
Searby <i>v.</i> Tottenham	409
Searle <i>v.</i> Cooke	409
Seddon <i>v.</i> Bank of Bolton	201
Sefton (Earl of) <i>v.</i> Court	187
Selby <i>v.</i> Crystal Palace District Gas Co....	337
— <i>v.</i> Nettlefold	435
Senhouse <i>v.</i> Christian	12, 77, 337, 339, 438
Senior <i>v.</i> Pawson	531
Serff <i>v.</i> Acton Local Board	112, 174, 325
Serrao <i>v.</i> Noel	530
Shackleton <i>v.</i> Sutcliffe	7
Shadwell <i>v.</i> Hutchinson	507, 508, 512
Shafto <i>v.</i> Johnson	351
Shapcott <i>v.</i> Mugford	167
Sharp <i>v.</i> Wilson	248, 252, 253
Sharpe <i>v.</i> Durrant	8
Shelfer <i>v.</i> City of London Electric Lighting Co.	397, 507, 509, 531
Sheppard <i>v.</i> Gilmore	83
Sherbrook <i>v.</i> Tufnell	373
Sherringham Urban District Council <i>v.</i> Holsey	404
Shiel <i>v.</i> Godfrey	27
Shoosmith <i>v.</i> Byerley	495
Short <i>v.</i> Taylor	68, 71
Shrewsbury's (Countess of) Case	387
— (Earl of) Case	498, 517
Shury <i>v.</i> Pigott	167
Shuttleworth <i>v.</i> Le Fleming	13, 202
Siddons <i>v.</i> Short	111, 373, 498
Simcox <i>v.</i> Yardley Rural District Council	409
Simper <i>v.</i> Foley	199, 216, 456, 457, 505
Simpson <i>v.</i> Att.-Gen.	236, 287
— <i>v.</i> Godmanchester Corporation	19, 28, 194, 197, 263, 286, 311, 411
— <i>v.</i> Lewthwaite	522
— <i>v.</i> Savage	498, 507, 508, 509, 510
Singleton <i>v.</i> Williamson	411
Sitwell <i>v.</i> Londesborough (Earl of)	27, 34, 81, 347
Sketchley <i>v.</i> Berger	326, 338, 339, 495
Skull <i>v.</i> Glenister	83, 333
Slingsby <i>v.</i> Barnard	358
Sloan <i>v.</i> Holliday	325

	PAGE
Smart <i>v.</i> Jones	61, 535
— <i>v.</i> Morton	348, 351
Smith <i>v.</i> Baxter	182, 199, 201, 239, 290, 444, 464, 473, 479, 489, 521
— <i>v.</i> Bennett	312
— <i>v.</i> Colbourne	7, 8, 62
— <i>v.</i> Darby	351
— <i>v.</i> Day	527, 528
— <i>v.</i> Giddy	418
— <i>v.</i> Great Western Rail. Co.	355
— <i>v.</i> Kenrick	384, 390
— <i>v.</i> Lambeth Assessment Committee	3
— <i>v.</i> London and South Western Rail. Co.	388
— <i>v.</i> Martin	358, 383
— <i>v.</i> Owen	305
— <i>v.</i> Smith	526, 527, 529, 530, 531
— Thackerah	371
— <i>v.</i> West Derby Local Board	519
Snark, The	515
Solomon <i>v.</i> Vintners' Co.	227, 361, 374, 378, 380, 381
Soltau <i>v.</i> De Held	395, 397, 525, 536, 537
Somerset <i>v.</i> Great Western Rail. Co.	334
Somerset Coal Canal Co. <i>v.</i> Harcourt	67, 69, 70, 71
Somerset (Duke of) <i>v.</i> Fogwell	61, 62, 65
Somersetshire <i>v.</i> Bridgewater	12, 194, 404
South <i>v.</i> Jones	167
South Eastern Rail. Co. <i>v.</i> Associated Portland	8, 27, 35
South Metropolitan Cemetery Co. <i>v.</i> Eden	329, 339, 480
South Staffordshire Waterworks Co. <i>v.</i> Mason	112
Southampton and Itchin Bridge Co. <i>v.</i> Local Board of Southampton	388
Southport <i>v.</i> Ormskirk	22, 442
Sowerby <i>v.</i> Coleman	5
Spedding <i>v.</i> Fitzpatrick	521
Spencer <i>v.</i> Clarke	82
— <i>v.</i> London and Birmingham Rail. Co.	537
Spencer's Case	80
Southwark Co. <i>v.</i> Wandsworth Board	373, 407
Spoor <i>v.</i> Green	86, 346
Squires <i>v.</i> Campbell	304
Stacey <i>v.</i> Sherrin	435
Stafford (Marquis of) <i>v.</i> Cooney	313
Staffordshire Canal Co. <i>v.</i> Hallen	112
Staffordshire and Worcestershire Canal Co. <i>v.</i> Birmingham Canal Co.	187,
197, 212, 219, 230, 263, 278	
Staigh <i>v.</i> Burn	461, 464, 473, 479, 497
Stainton <i>v.</i> Woolrych	388, 390
Standard Bank of British South America <i>v.</i> Stokes	406, 407, 409
Stanley of Alderley (Lady) <i>v.</i> Earl of Shrewsbury	530
Stansell <i>v.</i> Jollard	360, 378
Staple <i>v.</i> Heydon	88
Star <i>v.</i> Rookesby	410
Stedman <i>v.</i> Smith	407
Steer <i>v.</i> St. James Co.	426
Stileman-Gibbard <i>v.</i> Wilkinson	29, 197
Stiles <i>v.</i> Cowper	70, 71
Stockport Waterworks Co. <i>v.</i> Potter	3, 250, 251, 282, 403
Stoke Parish Council <i>v.</i> Price	4
Stokes <i>v.</i> City Offices Co.	532, 534
Stokoe <i>v.</i> Singers	463, 464, 484
Stone and Hastie, <i>In re</i>	409
Stott <i>v.</i> Stott	333
Stourbridge Navigation Co. <i>v.</i> Earl Dudley	353, 355
Strick <i>v.</i> City Offices	338, 495
Stroyan <i>v.</i> Knowles	346, 371
Sturges <i>v.</i> Bridgman	216, 220, 230, 236, 252, 394, 397, 404

	PAGE
Suffield <i>v.</i> Brown	15, 27, 30, 119, 112, 120, 157, 160, 375
Suffolk's (Earl of) Case	506
Sury <i>v.</i> Pigott	113, 118, 270, 312, 454, 455
Sutcliffe <i>v.</i> Booth	273
Sutherland <i>v.</i> Heathcote	195
— <i>v.</i> Sutherland	33
Sutton <i>v.</i> Bailey	7
— <i>v.</i> Clarke	384
Swaine <i>v.</i> Great Northern Rail. Co.	396, 526
Swainston <i>v.</i> Finn	458
Swansborough <i>v.</i> Coventry	127, 129, 131, 163
Swindon Waterworks Co. <i>v.</i> Wilts and Berks Canal Navigation Co.	245, 249, 253
Symons <i>v.</i> Leaker	205, 206

T.

TAFF VALE RAILWAY <i>v.</i> Gordon Canning	331, 332
Tanistry, le Case de	4
Taplin <i>v.</i> Florence	60
Tapling <i>v.</i> Jones	199, 216, 218, 289, 306, 471, 473, 476, 480, 489
Tatton <i>v.</i> Hammersley	91
Taws <i>v.</i> Knowles	131, 149, 163
Taylor <i>v.</i> Waters	36
Taylor <i>v.</i> Corporation of St. Helens	77, 284, 285, 438, 442, 443
— <i>v.</i> New Windsor Corporation	459
— <i>v.</i> Overseers of Pendleton	3
— <i>v.</i> Shafto	351
— <i>v.</i> Waters	21, 39, 42, 50, 54, 55, 57, 58, 59
— <i>v.</i> Whitehead	20, 433, 435, 436
Tebb <i>v.</i> Cave	27, 311
Tebbutt <i>v.</i> Selby	517, 524
Tenant <i>v.</i> Goldwin	155, 402, 421, 423, 424, 493, 518
Thackeray <i>v.</i> Wood	86
Thackrah <i>v.</i> Seymour	458
Theed <i>v.</i> Debenham	301, 302
Thicknesse <i>v.</i> Lancaster Canal Co.	458
Thomas <i>v.</i> Owen	88, 123, 125, 149, 165
— <i>v.</i> Sorrell	3, 51, 63
— <i>v.</i> Thomas	270, 456, 469
Thome <i>v.</i> Seabright	54
Thompson <i>v.</i> Eastwood	501
— <i>v.</i> Gibson	512
— <i>v.</i> Mein	350
— <i>v.</i> North Eastern Rail. Co.	392
Thomson <i>v.</i> Waterlow	91, 92, 95, 97, 98, 100, 101, 145
Thornton <i>v.</i> Little	335
Thorpe <i>v.</i> Brumfitt	18, 401, 495, 513, 524, 525
Thrower's Case	312
Thrupp <i>v.</i> Scrutton	408
Tickle <i>v.</i> Brown	183, 196, 222, 223, 228, 229, 511, 518, 519
Tilbury <i>v.</i> Silva	192, 200, 242
Tipping <i>v.</i> Eckersley	280, 536
— <i>v.</i> St. Helens Smelting Co.	71, 395, 399, 402
Titchmarsh <i>v.</i> Royston Water Co., Ltd.	104, 169, 180
Titterton <i>v.</i> Conyers	459
Tod Heatley <i>v.</i> Benham	397
Todd <i>v.</i> Flight	513
Todd, Birlestone & Co. and the N. E. Rail. Co., <i>In re</i>	354
Tolson <i>v.</i> Kaye	186
Tome <i>v.</i> Barwick	402
Tomlin <i>v.</i> Fuller	313

	PAGE
Tone <i>v.</i> Preston	29, 228, 374, 379
Tottenham <i>v.</i> Rowley	316, 339
Townsend <i>v.</i> Wathen	412
Trahern's Case	308
Traill <i>v.</i> McAlister	187, 220, 239, 404
Trinidad Asphalt Co. <i>v.</i> Ambard	345
Trower <i>v.</i> Chadwick	385, 518
Truman <i>v.</i> London, Brighton and South Coast Railway	388, 505
Truro (Corporation of) <i>v.</i> Rowe	4
Truscott <i>v.</i> Merchant Taylors' Co.	199, 303
Tucker <i>v.</i> Newman	270, 506, 510
Tulk <i>v.</i> Moxhay	82, 305
Tunbridge Wells <i>v.</i> Baird	21
Turberville <i>v.</i> Stampe	384, 387
Turner <i>v.</i> Crush	457
— <i>v.</i> Mirfield	280, 529
— <i>v.</i> Moon	7
— <i>v.</i> Morgan	407
— <i>v.</i> Sheffield and Rotherham Rail. Co.	458
— <i>v.</i> Spooner	442, 471
Turquand <i>v.</i> Fearon	520
Twyerould <i>v.</i> Chamber Colliery Co.	352
Tyler <i>v.</i> Bennet	10
— <i>v.</i> Hammond	454
— <i>v.</i> Wilkinson	241, 257, 447
Tyne Improvement Commissioners <i>v.</i> Imrie	188, 192
Tyrringham's Case	86, 448
Tyson <i>v.</i> Smith	4, 5

U.

UMFREVILLE <i>v.</i> Johnson	395, 505
Union Lighterage Co. <i>v.</i> London Graving Dock Co. ...	163, 169, 170, 227, 232,
	370, 373, 374, 379
United Land Co. <i>v.</i> Great Eastern Rail. Co.	316, 332, 333, 334

V.

VAN BREDA <i>v.</i> Silberbauer	244
Van Dieman's Land Co. <i>v.</i> Marine Board of Table Cape	80
Vaughan <i>v.</i> Menlove	384
— <i>v.</i> Taff Vale Rail. Co.	387, 388
Vere <i>v.</i> Lord Cawdor	415
— <i>v.</i> Minter	533
Vernon <i>v.</i> Vestry of St. James, Westminster	536
Villers <i>v.</i> Ball	518
Von Joel <i>v.</i> Hornsey	527
Vowles <i>v.</i> Mellor	409

W.

WADDINGTON <i>v.</i> Naylor	29, 374
Wallis <i>v.</i> Harrison and Others	3, 46, 59
Walter <i>v.</i> Montague	312
— <i>v.</i> Selfe	393
Walters <i>v.</i> Pfeil	378, 385, 386
Wandsworth <i>v.</i> United Telephone Co.	26
Warburton <i>v.</i> Parke	518
Ward <i>v.</i> Ward	484
Wardle <i>v.</i> Brocklehurst	89, 123, 278
Warr <i>v.</i> L. C. C.	3, 22, 51, 63

	PAGE
Warren <i>v.</i> Brown	295
Warwick <i>v.</i> Queen's College, Oxford	5, 193, 201, 489
Watercourse Case	68, 70, 71
Waterlow <i>v.</i> Bacon	460
Waterman <i>v.</i> Soper	416, 417, 418
Waterpark <i>v.</i> Fennell	79
Watkins <i>v.</i> Holman	242
— <i>v.</i> Overseers of Milton	3
Watson <i>v.</i> Gray	406, 407
— <i>v.</i> Troughton	163
Watts <i>v.</i> Kelson ... 30, 96, 98, 100, 123, 145, 147, 160, 161, 330, 335, 443, 468	
Weatherley <i>v.</i> Ross	471
Weaver <i>v.</i> Ward	384
Webb <i>v.</i> Bird	190, 197, 308, 309, 311, 363, 369
— <i>v.</i> Paternoster	42, 47, 48, 50, 52, 53, 54, 56, 57
Webber <i>v.</i> Lee	10
Welcome <i>v.</i> Upton	19, 202
Weld <i>v.</i> Hornby	79, 249, 438
Wells <i>v.</i> London, Tilbury and Southend Rail. Co.	316, 458
— <i>v.</i> Ody	292, 459, 517
Westbourne <i>v.</i> Mordant	402
Westbury <i>v.</i> Powell	313
Western <i>v.</i> Maedermott	83, 305
West Leigh Colliery Co. <i>v.</i> Tunncliffe and Hampson, Ltd.	346
West Riding <i>v.</i> Linthwaite	280
Westminster Brymbo Coal and Coke Co. <i>v.</i> Clayton	527
Westminster <i>v.</i> Johnson	21
Weston <i>v.</i> Alden	447
— <i>v.</i> Arnold	408, 459
Wettor <i>v.</i> Dunk	512
Whaley <i>v.</i> Laing	281
Whalley <i>v.</i> Lancashire Railway	286
— <i>v.</i> Thompson	88, 456
Whatman <i>v.</i> Gibson	165
Wheaton <i>v.</i> Maple & Co. ... 14, 77, 125, 192, 197, 198, 199, 211, 212, 217, 220	
Wheeldon <i>v.</i> Burrows ... 15, 109, 112, 120, 129, 135, 146, 147, 161, 163, 164, 165, 170, 375	
Wheeler <i>v.</i> Gray	408
White <i>v.</i> Bass	156, 157, 161
— <i>v.</i> Cohen	397
— <i>v.</i> Grand Hotel, Eastbourne	64, 329, 331
— <i>v.</i> Jameson	512
— <i>v.</i> Omnibus Co.	507, 509
— <i>v.</i> Reeves	458
— <i>v.</i> Southend Hotel Co.	80
— <i>v.</i> White	244, 262
Whitehead <i>v.</i> Parks	255, 261, 285, 449
Whitehouse <i>v.</i> Birmingham, &c. Canal Co.	388
— <i>v.</i> Fellowes	388
Whitmores <i>v.</i> Stamford	273, 434
Whitton <i>v.</i> Crompton	186
Wickham <i>v.</i> Hawker	195
Wicks <i>v.</i> Hunt	529
Wigford <i>v.</i> Gill	407, 500
Wigram <i>v.</i> Fryer	458
Wilde <i>v.</i> Minsterley	344, 357
Wilkes <i>v.</i> Greenway	168, 169
Wilkinson <i>v.</i> Poud	16
Williams <i>v.</i> Bagnall	350
— <i>v.</i> Earl of Jersey	67, 68, 70, 72, 112
— <i>v.</i> James	316, 324, 325, 326, 334
— <i>v.</i> Morland	252, 253, 522
Willmott <i>v.</i> Barber	69, 71
Wilson <i>v.</i> Hart	82

	PAGE
Wilson v. Newberry	418
— v. Peto	512
— v. Queen's Club	134
— v. Tavener	36, 61
— v. Townsend	471, 505, 508, 524, 528
Wilts and Berks Navigation Co. v. Swindon Waterworks Co.	523
Wiltshire v. Sidford	406
Wimbledon and Putney Commons Conservators v. Dixon	324, 340
Winford v. Wollaston	518
Winship v. Hudspeth	182, 222
Winter v. Baker	514
— v. Brockwell	37, 38, 41, 48, 59, 61, 62
Winterbottom v. Derby	501
Wiseman v. Booker	410
— v. Denham	167
Witherley v. Regent's Canal Co.	392
Withers v. Purchase	286
Withington v. Manchester	398
Wood v. Conway	394, 395
— v. Hewett	28, 262
— v. Lake	21, 42, 50, 54, 56, 57
— v. Leadbitter	38, 39, 48, 60, 62, 63
— v. Manley	50, 57
— v. Saunders	326, 443
— v. Stourbridge Rail. Co.	338
— v. Sutcliffe	403, 526
— v. Waud	24, 229, 253, 271, 272, 275, 278, 279, 397, 455
Woodman v. Pwllbach	29, 403
Wordledg v. Kingswel	88
Worthington v. Gimson	88, 135, 137, 139, 143, 147, 153
Wright v. Howard	7, 256
— v. Stavert	3, 55
— v. Williams	28, 197, 200, 206, 207, 215, 219, 225, 281, 403
Wyat Wild's Case	86, 448
Wyatt v. Harrison	343, 357, 359, 371, 517
Wynkoop v. Burger	341
Wynstanley v. Lee	239, 303, 527
Wyrley Canal Co. v. Bradley	353, 355

Y.

YARMOUTH v. Simmons	457
Yates v. Jack	293, 296, 532
Young v. Bankier Distillery	279, 280
— v. Davis	430
— v. Kinloch	340
— v. Spencer	253
— v. Star Omnibus Co., Ltd.	485, 529, 531
Ystradfyfodwg v. Bensted	21

Z.

ZETLAND (Earl of) v. The Glover Incorporation of Perth	242
Zetland v. Hislop	13

TABLE OF STATUTES.

	PAGE
29 Car. 2, c. 3 (Statute of Frauds)	3, 10
41 Geo. 3, c. 109 (Inclosure)	457
2 & 3 Will. 4, c. 71 (Prescription)	194—239, and <i>passim</i>
3 & 4 Will. 4, c. 27 (Limitation of Actions)	346, 364, 517
8 & 9 Vict. c. 18 (Lands Clauses)	33, 458
c. 20 (Railways Clauses)	354, 410, 458
c. 118 (Inclosure)	412, 458
10 & 11 Vict. c. 17 (Waterworks Clauses)	112, 353, 356, 458
20 & 21 Vict. c. clvii. (Mayor's Court Procedure Act)	504
21 & 22 Vict. c. 27 (Lord Cairns' Act)	529
c. 42 (extending Prescription Act to Ireland)	205
23 & 24 Vict. c. 154 (Tenant Law, Ireland)	35
25 & 26 Vict. c. 93 (Thames Embankment)	458
c. 102 (Metropolis Management)	300
33 & 34 Vict. c. 75 (Elementary Education)	458
36 & 37 Vict. c. 66 (Judicature)	63, 503, 504, 524, 527
37 & 38 Vict. c. 35 (repealing certain sections of Prescription Act)	205
c. 78 (Vendor and Purchaser)	10
38 & 39 Vict. c. 36 (Artizans and Labourers' Dwellings)	458
c. 55 (Support of Sewers)	112, 356, 397
39 & 40 Vict. c. 75 (Rivers Pollution Act, 1876)	281
41 & 42 Vict. c. 77 (Highways and Locomotives)	356
44 & 45 Vict. c. 41 (Conveyancing)	78, 80, 84, 85, 124
45 & 46 Vict. c. 38 (Settled Land)	10, 33, 34, 458
51 & 52 Vict. c. 43 (County Courts Act, 1888)	503
53 & 54 Vict. c. 69 (Settled Land)	34, 458
c. 70 (Housing of Working Classes)	458, 514
54 & 55 Vict. c. 40 (Brine Pumping)	260
56 & 57 Vict. c. cccxiii. (London Building Act)	408, 458
3 Edw. 7, c. 42 (County Courts Act, 1903)	503

ADDENDA.

- Page 21, line 11. } In connection with the statements in the text, see an instructive article by Mr. Charles Sweet on the "Easement of Tunnelling," L. Q. R. (1916), vol. 32, p. 70.
- Page 27, line 5. } In the case of an underground waterpipe quasi-easement (which was held to be "apparent"), the same will devised the quasi-dominant tenement to A. and the quasi-servient to B., and the quasi-easement passed by implication (*Schwann v. Cotton*, 1916, W. N. 133).
- Page 442, line 10. } (
- Page 29, line 24. } (
- Page 131, line 14. } (
- Page 34, line 20. Tenants for life of settled land were held authorized by a private Act to grant to a water company a perpetual easement to use a tunnel under the land in consideration of a perpetual rentcharge (*Westgate v. Powell Cotton* (1915), 113 L. T. 689).
- Page 63, line 20. *Hurst v. Picture Theatres* has been applied by an Irish Divisional Court in *David Allen v. King*, 1915, 2 I. R. 213.
- Page 112, line 17. Add in left-hand column of note: "As to damages for derogating from grant, see *Markham v. Paget*, 1908, 1 Ch. 697; *Jones v. Consolidated Collieries*, 1915, 1 K. B. 136."
- After "*Robinson v. Kilvert*," add "A sale for tipping refuse by a vendor who retains adjoining land does not authorize nuisance to adjoining land, where tipping can be done without nuisance (*Priest v. Manchester* (1915), 84 L. J. K. B. 1734), see *Woodman v. Pullbach*, quoted p. 405, *post*."
- Page 194, line 39. *Dysart v. Hammerton* was carried to the House of Lords, who, however, did not deal in detail with the question of presuming a lost grant, 1916, A. C. 57, see Lord Parker's words at p. 80; 85 L. J. Ch. at p. 43.
- Page 198, line 54, n., right col. } Add, "Where during part of the statutory period the dominant tenement was occupied and light enjoyed by A. under verbal agreement with B. occupying the servient tenement (who legally could not obstruct A.), time continued to run in favour of the right to light, A.'s enjoyment not being by a written agreement as mentioned in s. 3 of the Act (*Mallam v. Rose*, 1915, 2 Ch. 222; 84 L. J. Ch. 934)."
- Page 199, line 55, n., right col. } (
- Page 239, line 4. } (
- Page 349, line 19. In *Beard v. Moira*, 1915, 1 Ch. 257; 84 L. J. Ch. 155, the words reserving mining rights in a conveyance were held sufficient to exclude the presumption.
- Page 392, line 8. Add reference to *Att.-Gen. v. Roe*, 1915, 1 Ch. 235; 84 L. J. Ch. 322; *Crane v. S. Suburban Co.*, 1916, 1 K. B. 33; 85 L. J. K. B. 172.
- Page 405, line 6. See *Priest v. Manchester* (1915), 84 L. J. K. B. 1734.
- Page 425, line 27. See *Hart v. Rogers*, 1916, 1 K. B. 646; *Dobson v. Horsley*, 1915, 1 K. B. 634; 84 L. J. K. B. 399.
- Page 496, line 14. A highway may be dedicated subject to gates (*Att.-Gen. v. Meyrick* (1915), 79 J. P. 515).

TREATISE

ON THE

LAW OF EASEMENTS.

PART I.

OF EASEMENTS GENERALLY.

CHAPTER I.

OF THE NATURE OF AN EASEMENT.

IN addition to the ordinary rights of property, which are determined by the boundaries of a man's own soil, the law recognizes the existence, as accessorial to these general rights, of certain other rights to be exercised over the property of a neighbour, and therefore imposing a burden upon him.

Servitudes generally.

Those accessorial rights which confer merely a convenience to be exercised over the neighbouring land, without any participation in the profit of it, are called, by the law of England, "Easements"; as a right of way (*a*). Those accessorial rights, which are accompanied with a participation in the profits of the neighbouring soil, are called "Profits à prendre"; as rights of pasture, or of digging sand, or of shooting or fishing (*b*).

Easements distinguished from profits à prendre.

Both these classes are comprehended under the *Servitudes* of the civil law. In treating of *prædial Servitudes*, no distinction is made

(*a*) See the definition below, p. 9. of the Prescription Act (post, Part II.,
(*b*) See the cases referred under s. 1 Chap. 3).

Dominant
and servient
tenements.

Easements
distinguished
from obliga-
tions.

Easements
distinguished
from
licences.

between rights of this nature, whether accompanied or unaccompanied by a participation in the profits of the land (c).

The tenement to which the right is attached is called the dominant, that on which the burden is imposed the servient tenement. The term "servitude" is used to express both the right and the obligation; the term "easement" generally expresses the right only.

An easement differs from an obligation, inasmuch as it gives a right over the land of another; while an obligation gives a right only against the owner (d). In connection with this rule, it may be pointed out that where land is granted or demised for certain purposes, there, although no easement is created, an obligation may be implied on the part of the grantor or lessor which is analogous to that which arises from a restrictive covenant (e). It was so held where a building was demised for a purpose requiring an extraordinary amount of light (f); or where land was demised for the business of a timber merchant which required the access of air over an unlimited space (g); or where a building was demised for a purpose requiring freedom from vibration (h).

Again, an easement differs from a licence. When once an easement is validly created it is annexed to land (i). The benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation the dominant and servient tenements respectively come (k). A

(c) *Inter rusticorum prædiorum servitutes quidam computari rectè putant aquæ haustum, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.*—Inst. 2, 3, § 2; cf. Dig. 8, 3, § 1.

(d) Merlin, *Répertoire de Jurisprudence*, tit. Servitude, p. 45.

(e) See the judgment of Parker, J., *Browne v. Flower*, 1911, 1 Ch. 226; 80 L. J. Ch. 181.

(f) *Herz v. Union Bank*, 1861, 2 Giff. 686; 128 R. R. 230.

(g) *Aldin v. Latimer*, 1894, 2 Ch. 437; 63 L. J. Ch. 601.

(h) *Grosvenor Co. v. Hamilton*, 1894, 2 Q. B. 836; 63 L. J. Q. B. 661. Compare *Lyttelton v. Warner*, 1907, A. C. 476; 76 L. J. P. C. 100.

(i) See the question whether there can be an easement in gross discussed post, p. 11.

(k) *Leech v. Schweder*, 1874, 9 Ch. 474, 475, 476; 43 L. J. Ch. 487. As regards an annual sum payable for an easement by way of rent, it was laid down in *Co. Litt.* 47 a. that a rent

cannot be reserved by a subject out of an incorporeal inheritance; and that if a lease of such an inheritance reserve a payment by way of rent, it may be good as a contract, but the payment will not pass with the grant of the reversion, for it is no rent incident to the reversion. And see *Capel v. Buszard*, 1829, 6 Bing. 150; 32 R. R. 359. Reference should be made to *Hastings v. N. E. R.* (1898, 2 Ch. 674; 67 L. J. Ch. 590; see 1900, A. C. 260), where an owner in fee of land leased an easement over it for a term of years to a railway company, who covenanted to pay to the lessor, his heirs and assigns, certain annual sums called rents, and on the death of the lessor it was held that the right to recover the future payments passed to the next owner of the servient tenement. A payment reserved on the grant of an easement by a tenant in occupation of the servient tenement ceased with the tenancy. *Jones v. Dorothea*, 1887, 58 L. T. 80.

licence, on the other hand, unless coupled with a grant, is personal to both grantor and grantee (*l*), and neither binding on the assignee of the licensor (*m*) nor generally assignable by the licensee (*n*). "A dispensation or licence properly passes no interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants" (*o*).

Again, an easement must be distinguished from a customary

Easements
distinguished

(*l*) Hence, a mere licensee cannot maintain in his own name an action for infringement against a stranger. *Hill v. Tupper*, 1863, 2 H. & C. 121; 133 R. R. 605; *Stockport v. Potter*, 1864, 3 H. & C. 300; 140 R. R. 453; *Kensit v. G. E. R.*, 1884, 27 Ch. D. 122; 54 L. J. Ch. 19; *Heap v. Hartley*, 1889, 42 Ch. D. 461; 58 L. J. Ch. 790. But the grantee of an exclusive right of fishing or shooting has a right to carry away the fish or game caught or shot, and can therefore sue a stranger. *Fitzgerald v. Firbank*, 1897, 2 Ch. 96; 66 L. J. Ch. 529; *Radcliffe v. Hayes*, 1907, 1 I. R. 101. See 1 Smith, L. C., ed. 11, p. 345. As has been already stated, the subject of such a grant is a profit à prendre, and confers an interest in the land. Hence, too, a licence is not within the Statute of Frauds, s. 4, so as to require a written instrument for its creation. *Jones v. Flint*, 1839, 10 A. & E. 753; 50 R. R. 527; *Wright v. Stavert*, 1860, 2 E. & E. 721; 119 R. R. 930. Nor is the licensee rateable to the relief of the poor as an occupier of land. *Watkins v. Milton*, 1868, L. R. 3 Q. B. 350; 37 L. J. M. C. 73; *R. v. St. Pancras*, 1877, 2 Q. B. D. 581; 46 L. J. M. C. 243; cf. *Cory v. Bristol*, 1877, 2 App. Cas. 262; 46 L. J. M. C. 273; *Smith v. Lambeth*, 1882, 10 Q. B. D. 327; 52 L. J. M. C. 1; *Taylor v. Pendleton*, 1887, 19 Q. B. D. 288; 56 L. J. M. C. 146. Cf. on the subject of the note, *Pym v. Harrison*, 1876, 33 L. T. 796. As to revoking a licence, see the authorities, Part II., Chap. I, sect. 2, post.

(*m*) *Wallis v. Harrison*, 1838, 4 M. & W. 538; 51 R. R. 715 (licence to make

and use wayleave held not binding on assignee of licensor); *Roffey v. Henderson*, 1851, 17 Q. B. 574; 85 R. R. 571 (licence by landlord to tenant to remove fixtures after expiration of tenant's term, held not binding on a subsequent lessee without notice); *Coleman v. Foster*, 1856, 1 H. & N. 37; 108 R. R. 442 (licence to enter a theatre held to be determined by an assignment of the theatre); *Richards v. Harper*, 1866, L. R. 1 Exch. 199; 35 L. J. Ex. 130 (licence to let down surface). Cf. *Pemsel v. Tucker*, 1907, 2 Ch. 191; 76 L. J. Ch. 621. See, as to a licence coupled with a grant, *Brooke, Abr. art. Trespass*, pl. 400; 7 Bac. Abr. p. 676, art. Trespass, F. 1.

(*n*) See *Muskett v. Hill*, 1839, 5 Bing. N. C. 694; 50 R. R. 832; *Mitcalfe v. Westaway*, 1864, 34 L. J. C. P. 43; *Re Davis*, 1838, 22 Q. B. D. 193.

(*o*) *Thomas v. Sorrell*, 1679, Vaugh. 351; quoted by Tindal, C.J., in *Muskett v. Hill*, ubi sup., and by Romer, L.J., in *Warr v. London C. C.*, 1904, 1 K. B. 721; 73 L. J. K. B. 362. See also *Latham v. Johnson*, 1913, 1 K. B. 404; 82 L. J. K. B. 258. Cf. as to sales of growing crops, *Parker v. Staniland*, 1809, 11 East, 362; 10 R. R. 521; *Crosby v. Wadsworth*, 1805, 6 East, 602; 8 R. R. 533; *Evans v. Roberts*, 1826, 5 B. & C. 829; 29 R. R. 421; *Carington v. Roots*, 1837, 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583; *Sainsbury v. Matthews*, 1838, 4 M. & W. 343; 8 L. J. Ex. 1; 51 R. R. 620; *Jones v. Flint*, ubi sup. As to the effect of a licence, see further the discussion of the authorities in Part II., Chap. I, sect. 2, post.

from cus-
tomary rights
in the nature
of easements.

right. For there are many customary rights which in their mode of enjoyment partake of the character of easements; such as a custom for the inhabitants of a vill to dance upon a particular close at all times of the year (*p*); a custom for the inhabitants of a parish to play at all kinds of lawful games in a close at all seasonable times of the year (*q*); a custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close and have horse races thereon (*r*); a custom that every inhabitant of a town shall have a way over land either to the church or to market (*s*); a right to use a strip of land as a promenade (*t*); a custom for liege subjects exercising the trade of a victualler to erect booths on the waste of a manor at the time of fairs (*u*); a custom for the inhabitants of a township to go to a close and take water from a spring (*x*); a custom to moor vessels in a navigable tidal estuary of the river Thames (*y*); a custom to deposit oysters dredged from an oyster fishery upon the foreshore in another part of the fishery (*z*); a custom for all the inhabitants of a parish, being fishermen, to dry their nets on a particular close adjoining the sea and the property of a private owner (*a*); a custom for the burgesses and inhabitants of a burgh (in Scotland) to use a strip of ground for the purposes of recreation and amusement and the bleaching and drying of clothes (*b*). As, however, the existence and validity of these rights generally depend upon some local custom excluding the operation of the general rules of law (*consuetudo tollit communem legem*) (*c*), and they are some-

(*p*) *Abbot v. Weekly*, 1677, 1 Lev. 176; cf. *Hall v. Nottingham*, 1875, 1 Ex. D. 1; 45 L. J. Ex. 50.

(*q*) *Fitch v. Rawling*, 1795, 2 H. Bl. 393; 3 R. R. 425. As to what are seasonable times, see *Bell v. Wardell*, 1740, Willes, 202. A customary right claimed for the inhabitants of several adjoining parishes was held bad in *Edwards v. Jenkins*, 1896, 1 Ch. 308; 65 L. J. Ch. 222.

(*r*) *Mounsey v. Ismay*, 1865, 1 H. & C. 729; 3 H. & C. 486; 130 R. R. 753; 140 R. R. 567.

(*s*) *Gateward's Case*, 1607, 6 Rep. 59; *Brocklebank v. Thompson*, 1903, 2 Ch. 344; 72 L. J. Ch. 626.

(*t*) *Abercromby v. Fermoy*, 1900, 1 I. R. 302.

(*u*) *Tyson v. Smith*, 1837, 9 A. & E. 406; 48 R. R. 539. Cf. *Elwood v. Bullock*, 1844, 6 Q. B. 383; 66 R. R. 429; *Chaplin v. Betsworth*, 1690, 3 Lev. 190.

(*x*) *Race v. Ward*, 1855, 4 E. & B. 702; 24 L. J. Q. B. 153. See also 7 Vin. Abr., Customs, p. 178; and

Harrop v. Hirst, 1868, L. R. 4 Exch. 43; 38 L. J. Ex. 1. A parish council cannot in their own name, without the Attorney-General, maintain an action to enforce a right of the inhabitants of the parish to the use of a spring. *Stoke Council v. Price*, 1899, 2 Ch. 277; 68 L. J. Ch. 447. There cannot be a customary right for the public to take water from a well. *Dungarvan v. Mansfield*, 1897, 1 I. R. 420.

(*y*) *A.-G. v. Wright*, 1897, 2 Q. B. 318; 66 L. J. Q. B. 834.

(*z*) *Truro v. Rowe*, 1901, 2 K. B. 870; 1902, 2 K. B. 709; 71 L. J. K. B. 794.

(*a*) *Mercer v. Denne*, 1904, 2 Ch. 534; 1905, 2 Ch. 538; 74 L. J. Ch. 71, 723.

(*b*) *Montgomerie v. Wallace-James*, 1904, A. C. 73; 74 L. J. P. C. 25.

(*c*) *Le Case de Tanistry*, Davys, 31 (b), 32 (a); Co. Litt. 33 b. 113 b; 1 Rolle, Abr. Custom, C. 558. See *Tyson v. Smith*, 1838, 9 A. & E. 421; 48 R. R. 539. *Coventry v. Willes*, 1863, 9 L. T. 384; 138 R. R. 940; and *Bourke v. Davis*, 1889, 44 Ch. D. 110.

times entirely independent of any express or implied agreement between the parties, they generally stand upon a different footing, and are not in all respects governed by the same principles as those which determine the boundaries of private easements.

Some differences between these customary rights and private easements may be mentioned here. Thus, customary rights are claimed for a fluctuating class, in respect of a locality, and it is unnecessary to look out for their origin as arising from grant or otherwise. Private easements, on the other hand, are claimed by defined persons, and arise from a grant which is either express or is implied from prescriptive user. And in the case of prescription founded on the presumption of a grant, it has been laid down that no prescription can have had a legal origin where no grant could have been made to support it (*d*).

Again, customary rights involving the interests of a locality are disallowed if they are unreasonable (*e*). As regards private rights involving only the interests of the owner of the dominant tenement on the one hand and the servient on the other, the rule as to reasonableness requires to be stated more at length. It is settled first that a private easement must be an incident of a known

(*d*) See the judgments of Tindal, C.J., in *Lockwood v. Wood*, 1844, 6 Q. B. 64; 66 R. R. 278, and of Farwell, J., in *Mercer v. Denne*, 1904, 2 Ch. 556; 74 L. J. Ch. 71.

(*e*) See the judgments of Tindal, C.J., in *Tyson v. Smith*, 1838, 9 Ad. & E. 421, 48 R. R. 539, and of Parker, J., in *Johnson v. Clark*, 1908, 1 Ch. 311; 77 L. J. Ch. 127. "Every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom: for that ought to be reasonable and ex certis causis rationabili (as Littleton saith) usitata, but need not be intended to have a lawful beginning; as custom to have land devisable, or of the nature of gavelkind or borough-English, &c." *Gateward's Case*, 1607, 6 Rep. 59. The context shows that the statement applies to the minor local customs as well as to those given as instances. Cf. the judgment of the Lord Chancellor in *Dyce v. Hay*, 1 Macqueen, 305; *Millichamp v. Johnson*, 1746, Willes, 205, n.; *Blewitt v. Tregonning*, 1835, 3 A. & E. 554; 42 R. R. 463; 4 L. J. K. B. 234; *Mounsey v. Ismay*, 1853, 1 H. & C. 729; 3 H. & C. 486; 130 R. R. 753; *Blackett v. Bradley*, 1862, 1 B. & S. 940; 31 L. J. Q. B. 65; 124 R. R. 815; *Sowerby v. Coleman*, 1867, L. R. 2

Exch. 96; 36 L. J. Ex. 57; *Warrick v. Queen's College*, 1870, 10 Eq. 105; 40 L. J. Ch. 780; *Hall v. Nottingham*, 1875, 1 Ex. D. 1; 45 L. J. Ex. 50.

In *Salisbury v. Gladstone*, 1861, 9 H. L. C. 692; 131 R. R. 403 (a case of copyhold custom), Lord Cranworth said: "In truth I believe that, when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom." But it seems possible to keep the fiction of a right conferred out of the question, and to recognize the existence of local laws subject to a common law rule as to reasonableness. The rule was considered in *Goodman v. Saltash*, 1882, 7 App. Cas. 633; 52 L. J. Q. B. 193, where the appellant's claim was affirmed, not as a servitude, but as a trust or condition qualifying the title of the respondents. And cf. *A.-G. v. Antrobus*, 1905, 2 Ch. 188; 74 L. J. Ch. 599.

and usual kind (*f*), and secondly that a private easement cannot confer the exclusive use of a servient tenement (*g*). Beyond these two limitations no question of reasonableness can arise where the title to an easement is based on express grant. It seems also probable that beyond the above limitations no question of reasonableness can arise where the title to an easement is based on prescription (*h*).

Easements distinguished from common law rights in the nature of easements.

Lastly, an easement must be distinguished from certain natural rights which exist as ordinary incidents of property, such as the right of support for the soil in its natural state, and the right of a riparian owner to the flow of a stream in its natural course. The character of such natural rights is explained in *Bonomi v. Backhouse* (*i*); and it has been determined that such rights exist at common law, wholly independent of any conveyance by one owner to another (*k*). The classification of some of the incidents of the complete enjoyment of land as natural rights on the one hand, and easements on the other, has been made by the law somewhat arbitrarily. Thus, the right of riparian owners to the flow of a natural stream is a natural right of property (*l*); no easement need be acquired for the full enjoyment of this right; it exists by virtue of the ownership of the land, in the same way as does the right to graze cattle, or to make any other legal use of a man's own tenement. In the same way the right to the support of land unincumbered by buildings exists as a natural right of property inherent in the land (*m*). The right to light, however, which might appear to be logically indistinguishable from the above, as a right derived direct from Nature without the intervention of any human effort, stands, in the eye of the law, upon a totally different footing (*n*). No natural right exists to a single ray of light, except in so far as, the ownership of land being deemed to extend even to the heavens, it is not possible for a man's land to be actually roofed in against his will. The maxim "*Cujus est solum ejus est usque ad cœlum*" can hardly be advanced as the reason for the distinction which exists, for example, between the right of the owner of land to receive light and his right to receive lateral support; for the maxim continues

(*f*) See post, p. 20.

(*g*) See post, p. 21.

(*h*) See, however, the rule of reasonableness applied by Cozens-Hardy, L.J., to a prescriptive claim to a profit à prendre in *Chesterfield v. Harris*, 1908, 2 Ch. 410; 77 L. J. Ch. 688.

(*i*) 1859, E. B. & E. p. 654; 9 H. L. C. 503; 113 R. R. 799.

(*k*) See the observations of Wood,

V.-C., in *N. E. R. Co. v. Elliot*, 1860, 1 J. & H. 145; 128 R. R. 313; *Kensit v. G. E. R. Co.*, 1884, 27 Ch. D. 133; 54 L. J. Ch. 19; *Angus v. Dalton*, 1878, 4 Q. B. D. 191; 48 L. J. Q. B. 231; 6 App. Cas. 752; *Portsmouth v. L. B. & S. C. R.*, 1909, 26 T. L. R. 173.

(*l*) Post, Part III., Chap. 1.

(*m*) Post, Part III., Chap. 6.

(*n*) Post, Part III., Chap. 3.

“et ad inferos.” In some of the American States this maxim is, with greater consistency, adopted in its entirety; the right to support stands upon the same footing in this respect as the right to light, there being no natural right to either; indeed, so jealously is the maxim applied, that rights to support or light, which would infringe upon it, may not even be acquired by prescription.

As regards the inherent nature of an easement, it is clear that in the eye of the law an easement is valuable property. Its existence may add to the value of the dominant, and detract from the value of the servient, tenement. It is moreover in itself in the nature of real estate (see post, p. 10). Consequently where land was agreed to be sold in fee with a superadded easement and the vendor only held the easement under a lease, he could not make a title (*o*). Again, in several cases the existence of a legal easement undisclosed to a purchaser has been held to be a material defect in the title which must be shown on the sale of land (*p*). And a purchaser has recovered damages on the ground that the existence of such an easement was a breach of the vendor's covenants for title to land (*q*).

Where the servient tenement was agreed to be sold, an equitable right to an easement of which the intending purchaser had notice was an objection to title (*r*). But the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*s*). And the purchaser for value without notice of the servient tenement was not bound by a merely equitable right to light (*t*). Where the dominant tenement was agreed to be sold, there was no objection to title in the existence of an undisclosed agreement that the light of the dominant tenement was enjoyed by permission (*u*). A contract to sell buildings described by a plan which shows windows does not imply any representation or warranty of a legal right to the access of light to those windows (*x*).

An easement is valuable property. It is in the nature of real estate, and may give rise to a defect in title.

(*o*) *Wright v. Howard*, 1823, 1 Sim. & Stu. 190; 1 L. J. Ch. 94; 24 R. R. 169.

(*p*) *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609; 75 R. R. 216; *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357; 53 L. J. Ch. 492; *Ashburner v. Sewell*, 1891, 3 Ch. 405; 60 L. J. Ch. 784; *Re Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666.

(*q*) *Sutton v. Bailey*, 1891, 65 L. T. 528. See *Turner v. Moon*, 1901, 2 Ch. 825; 70 L. J. Ch. 822. Compare the statement that the natural rights in respect of water of a riparian owner are

part of the fee simple and inheritance of the riparian land. *Portsmouth v. L. B. & S. C. R.*, 1909, 26 T. L. R. 173.

(*r*) *Pemsel v. Tucker*, 1907, 2 Ch. 191; 76 L. J. Ch. 621.

(*s*) *Allen v. Seckham*, 1878, 11 Ch. D. 790; 48 L. J. Ch. 611.

(*t*) *Prinsep v. Belgravian*, 1896, W. N. 39.

(*u*) *Smith v. Colbourne*, 1914, 2 Ch. 533; 84 L. J. Ch. 112.

(*x*) *Smith v. Colbourne*, ubi sup.; *Greenhalgh v. Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

Relation of
easements to
perpetuity.

As regards the relation of easements to perpetuity, the rule appears to be that if an easement be created in presenti so as to be vested in some person, there is no objection to it on the ground of perpetuity (*y*). With respect to an easement to arise in futuro, it seems that a common law grant de novo of an incorporeal hereditament may commence in futuro (*z*). But in the case of easements, the better opinion is that the rule against perpetuity governs also the creation of an easement in futuro (*a*).

Where the dominant tenement was being sold and a question arose between vendor and purchaser as to an agreement to the effect that the owner of the servient tenement might "at any time thereafter" enter and remove the windows of the dominant tenement, the clause was held by the Court of Appeal to be a mere licence which would not bind the purchaser after conveyance; but it was said that if it amounted to an easement, it would be void under the rule against perpetuity (*b*).

On the other hand, where a landowner conveyed land to a railway company reserving to himself, his heirs and assigns, the right at any time thereafter to make a tunnel, it was held by Eady, J., that the words amounted to a reservation of an immediate easement of tunnelling, not a right to arise at some future time. In the Court of Appeal the clause was treated as a personal contract which never attached to the land (*c*).

(*y*) *S. E. R. Co. v. Associated Portland*, 1910, 1 Ch. 25; 79 L. J. Ch. 150. In *L. & S. W. R. Co. v. Gomm*, 1882, 20 Ch. D. 583; 51 L. J. Ch. 530, Jessel, M.R., treated easements as an exception to the rule against remoteness.

(*z*) *Gilbert on Rents*, p. 59; *Challis*, R. P., 3rd ed., p. 112.

(*a*) *Real Property Commissioners*, 3rd Report, p. 36; *Gray on Perpetuities*, 2nd ed., § 316.

(*b*) *Smith v. Colbourne*, 1914, 2 Ch. 543; 84 L. J. Ch. 611.

(*c*) *S. E. R. Co. v. Associated Portland*, 1910, 1 Ch. 24, 27, 33; 79 L. J. Ch. 150. See *Ardley v. St. Pancras*, 1870, 39 L. J. Ch. 871, where the reservation of a right of way to arise in a future event seems to have been held valid; *Sharpe v. Durrant*, 1911, 55 Sol. J. 423.

CHAPTER II.

OF THE QUALITIES OF AN EASEMENT.

AN easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged “to suffer or not to do” something on his own land for the advantage of the dominant owner (*a*). The tenement over which the privilege is exercisable is called the servient tenement; and the tenement which enjoys the privilege is called the dominant tenement.

Definition.

The general qualities of easements may conveniently be discussed under the following heads:—

Qualities of
an easement

- (1) Easements are incorporeal hereditaments.
- (2) As to the rule that there must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation is imposed. Devolution of an easement.
- (3) As to the rule that the dominant and servient tenements must belong to different owners. Meaning of quasi-easements.
- (4) What must be the nature of a dominant tenement.
- (5) In relation to a dominant tenement, an easement must be connected with its enjoyment.
- (6) An easement must be an incident of a known and usual kind.
- (7) In relation to the servient tenement, easements are imposed upon corporeal property, not upon the person of the owner.
- (8) An easement cannot confer the exclusive use of the servient tenement.
- (9) Easements do not confer participation in the profits of a servient tenement.
- (10) By the civil law the causes of easements must be perpetual.

(*a*) See *Termes de la Ley*, tit. Easements; *Mounsey v. Ismay*, 1865, 3 H. & C. 497; 34 L. J. Ex. 52; 140 R. R. 567. Gale's definition was quoted by Kay, L.J., *Metropolitan R.*

Co. v. Fowler, 1892, 1 Q. B. 180; 62 L. J. Q. B. 553. An easement is “some right which a person has over land which is not his own”: per Lord Esher, *ib.* 171.

SECT. 1.—*Easements are Incorporeal Hereditaments.*

Easements
are in-
corporeal
here-
ditaments.

It was laid down by Bayley, J., in 1826 that “A right of way, or right of passage for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights” (*b*). Easements, however, are now also properly described as “incorporeal hereditaments.” This was not so in the time of Lord Coke (*c*). But for a long period they have been referred to as incorporeal hereditaments in text-books of authority (*d*), and also by the Courts (*e*). The right to take water from a well for the convenience of a house has been held to be an interest in land (*f*). And generally an easement appears to fall within the words “lands or hereditaments” in s. 4 of the Statute of Frauds (*g*), and within “land” in the Vendor and Purchaser Act, 1874 (*h*). It seems also to be “land” within the Settled Land Acts (*i*). Reference may further be made to the cases (quoted ante, p. 7) to the effect that undisclosed legal easements have been held to be a material defect in the title to land.

Considered with regard to the servient tenement, an easement is but a charge or obligation, curtailing the ordinary rights of property (*k*); with regard to the dominant tenement, it is a right accessory to these ordinary rights—constituting, in both cases, a new quality impressed upon the respective heritages (*l*).

(*b*) *Hewlins v. Shippam*, 1826, 5 B. & C. 221; S. C. 7 D. & R. 783; 31 R. R. 757; 4 L. J. (O. S.) K. B. 241.

Servitutes prædiorum rusticorum, etiam si corporibus accedunt, incorporeales tamen sunt.—Dig. 8, 1, 14, de serv.

(*c*) Challis' Real Prop., 3rd ed., 51.

(*d*) Ibid., 55.

(*e*) *Bryan v. Whistler*, 1828, 8 B. & C. 293; 6 L. J. K. B. 302; *Hill v. Midland R.*, 1882, 21 Ch. D. 147; 51 L. J. Ch. 774; *G. W. R. v. Swindon R.*, 1882, 22 Ch. D. 697, 706; 9 App. Cas. 802, 808; 53 L. J. Ch. 1075; *Jones v. Watts*, 1890, 43 Ch. D. 585; *Hastings v. N. E. R.*, 1898, 2 Ch. 678; 67 L. J. Ch. 590; *Gardner v. Hodgsons Co.*, 1901, 2 Ch. 209, 217; 70 L. J. Ch. 504.

(*f*) *Tyler v. Bennett*, 1836, 5 Ad. & El. 377.

(*g*) *McManus v. Cooke*, 1887, 35 Ch. D. 689, 690; 56 L. J. Ch. 662; see *Rowe v. London School Board*, 1887, 36 Ch. D. 619; 57 L. J. Ch. 619; *Webber v. Lee*, 1882, 9 Q. B. D. 315; 51 L. J. Q. B. 485. In *Metropolitan R. Co. v. Fowler*, 1892, 1 Q. B. 171, 181, 184; 62

L. J. Q. B. 553, it seems to have been assumed that a mere easement was not a “hereditament” within the meaning of the Land Tax Act.

(*h*) *Jones v. Watts*, sup.

(*i*) *Challis*, 56; see *Re Brotherton*, B. v. B., 1907, W. N. 230; 1908, W. N. 56; 77 L. J. Ch. 58. A grant of a new easement is not a “conveyance of property” within the meaning of Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881. In *re Sanders' Settlement*, 1896, 1 Ch. 480; 65 L. J. Ch. 426. As to rateability, see *G. W. R. v. Badgworth*, 1867, L. R. 2 Q. B. 251; 36 L. J. M. C. 33; *Holywell v. Halkyn*, 1895, A. C. 117; 64 L. J. M. C. 113. As to liability for land tax, see *Metropolitan R. Co. v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553.

(*k*) Pertinent enim ad libera tenementa jura sicut et corpora, jura sive servitutes, diversis respectibus; jura autem sive libertates dici poterunt ratione tenementorum quibus debentur.—Bracton, lib. 4, fol. 220 b.

(*l*) Quid aliud sunt jura prædiorum quam prædia qualiter se habentia? Ut

SECT. 2.—*As to the Rule that there must be Two distinct Tenements, the Dominant to which the right belongs, and the Servient upon which the obligation is imposed. Devolution of an Easement.*

First, as to the necessity of there being a dominant tenement.

On this point Mr. Gale wrote as follows:—"An easement, as such, can only be claimed as accessory to a tenement. This position was recognized as law by the judges in a very early case (*m*). 'Suppose,' said Shars, J., 'I grant to you a way over my land to a certain mill, and you are not seised of this mill at the time, but you purchase it afterwards: notwithstanding I disturb you in this way afterwards, you shall not have assize, though you may have a writ of covenant.' To which it was replied, 'In your case it is no marvel to me, although no assize lies, inasmuch as he had not the frank tenement to which he claimed to have (dut avoir) the way, at the time the way was granted to him, and therefore he could not have had assize if he had been disturbed at the time when the grant was made; and as he could not then have assize, the purchase of the frank tenement afterwards would not enable him to maintain this action'" (*n*).

"Nullus hujusmodi servitutes," says Bracton, "constituere potest, nisi ille, qui fundum habet et tenementum; quia prædiorum, aliud liberum, aliud servituti suppositum (*o*).

"Et ita pertinent servitutes alicui fundo ex constitutione sive ex impositione de voluntate dominorum" (*p*).

Mr. Gale also wrote thus:—"Many personal rights, which, in their mode of enjoyment, bear a great resemblance to easements, (as for instance, rights of way), may be conferred by actual grant, independently of the possession of any tenement by the grantee. But such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only."

Upon this paragraph Mr. Henry Willes, a former editor, wrote the following note:—"It may be questioned, however, whether the owner of an easement in gross would not have the same remedies which he would have if it were appurtenant; a right of common or

There must be two tenements. Gale's view that a dominant tenement is essential to the existence of an easement.

View of Mr. Henry Willes.

bonitas, salubritas, amplitudo.—Dig. 50, 16, 86, de v. s.

(*m*) 21 Edw. 3, 2, plac. 5.

(*n*) As to this case, see *Rymer v. McLtroy*, 1897, 1 Ch. 582; 66 L. J. Ch. 36; and *North British Co. v. Park Yard Co.*, 1898, A. C. 643.

(*o*) Lib. 4, f. 220 b.

(*p*) Idem, f. 221 a. Quoties nec

hominum, nec prædiorum, servitutes sunt, quia nihil vicinorum interest, non valet; veluti ne per fundum tuum eas, aut ibi consistes, et ideo si mihi concedas jus tibi non esse fundo tuo uti, frui, nihil agitur; aliter atque si concedas mihi jus tibi non esse in fundo tuo aquam quærere, minuendæ meæ aquæ gratiâ.—Dig. 8, 1, 15, de serv.

other profit à prendre may be claimed as a right in gross, and there should seem to be no reason why an incorporeal right, not involving participation in the profits of the servient tenement, should not be capable of being conferred in like manner with an incorporeal right involving such participation. The case of *Ackroyd v. Smith* (1850, 10 C. B. 164 ; 19 L. J. C. P. 315 ; 84 R. R. 507) is not inconsistent with this position. The point decided by that case is, that a right of way cannot be so granted as to pass to the successive owners of land, as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant ; in fact the grant in that case is an instance of an attempt to create a new kind of estate, a right of way at the same time in gross and appurtenant ; in gross in that it was in fact unconnected with *the enjoyment of the land* to which it was attempted to make it appurtenant ; and appurtenant in that the grant purported to limit it so as to go to the successive owners of that land in succession. This attempt of course failed, but the case does not affect the position that as profits à prendre may be claimed in gross, so also mere easements may be claimed in gross, and that such right may be accompanied with all the same remedies as easements appurtenant, and that the burden of them may run with the tenement over which they are claimed. Lord St. Leonards, in *Dyce v. Hay* (1 Macqueen, 312), expressly laid down that a dominant tenement is not necessary for the existence of an easement according to the English law, and some of the cases quoted are instances to show that the existence of easements in gross is recognized by that law."

Can there be
an easement
in gross ?

The above statement by Mr. Henry Willes as to the opinion expressed by Lord St. Leonards in *Dyce v. Hay* goes beyond the words appearing in 1 Macqueen, 312. Mr. Willes' note, however, was referred to without disapproval in *Mounsey v. Ismay* (q). And it seems that in a wide sense an easement in gross (e.g., an easement in the nature of a right to discharge sewage into a tidal river or sea) might be acquired by the corporation of a town on behalf of the inhabitants, the right being based on a lost grant from the Crown (r), or possibly on prescription at common law (s). Perhaps also the doctrine that there may be easements in gross might be supported by *Senhouse v. Christian* (t). Again, the expression "easements in gross" is used in some cases relating to customary rights referred to above, p. 4.

(q) 1863, 3 H. & C. 495.

(r) *Somersetshire v. Bridgwater*,
1899, 81 L. T. 732.

(s) *Foster v. Warblington*, 1906, 1
K. B. 664 ; 75 L. J. K. B. 514.

(t) 1787, 1 T. R. 560.

On the other hand, it has been formally decided that there can be no easement, properly so called, unless there be both a servient and a dominant tenement (u).

Thus Lord Cairns said: "There can be no easement, properly so called, unless there be both a servient and a dominant tenement. It is true that in the well-known case of *Dovaston v. Payne* (1795, 2 H. Bl. 527) Mr. Justice Heath is reported to have said, with regard to a public highway, that the freehold continued in the owner of the adjoining land subject to an easement in favour of the public; and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement" (v).

As regards the acquisition of an easement under the Prescription Act, 1832 (see the language of s. 5), it has been held that to be within the Act an easement must be in some way appurtenant to a dominant tenement (w).

There should be noted here a decision to the effect that a restrictive covenant purporting to bind the land of the covenantor does not, where the covenantee had no land at the date of the covenant, bind derivative owners claiming under the covenantor (x). The rights arising under a restrictive covenant have been described as "negative easements" (y); and it appears to result from the above decision that such negative easements cannot exist in gross (z).

With respect to the devolution of an easement, it is clear that, according to the civil law, a servitude when once acquired passed with the heritage into the hands of each successive owner (a). So

Devolution
of an
easement.

(u) *Rangeley v. Midland R. Co.*, 1868, 3 Ch. 310; 37 L. J. Ch. 313; *Hawkins v. Rutter*, 1892, 1 Q. B. 671; 61 L. J. Q. B. 146.

(v) *Rangeley v. Midland R. Co.*, sup.
(w) *Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687; 34 L. J. C. P. 309.

(x) *London County Council v. Allen*, 1914, 3 K. B. 642; 83 L. J. K. B. 1695.

See *Millbourn v. Lyons*, 1914, 2 Ch. 231; 83 L. J. Ch. 737.

(y) *Re Nisbet and Potts*, 1906, 1 Ch. 402, 406; 75 L. J. Ch. 238.

(z) See *Zetland v. Hislop*, 1882, 7 App. Cas. 446.

(a) Si fundus serviens, vel is cui servitus debetur, publicaretur, utroque casu durant servitutes; quia cum suâ

in English law, when once an easement is validly created, the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation the dominant and servient tenements respectively come (b).

SECT. 3.—*As to the Rule that the Dominant and Servient Tenements must belong to different owners. Meaning of Quasi-easements.*

The two tenements must belong to different owners.

It is obvious that if the dominant and servient tenements are the property of the same owner, the exercise of the right which in other cases would be the subject of an easement is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure, without in any way increasing or diminishing those rights. It is therefore essential that the dominant and servient tenements should belong to different owners: immediately they become the property of the same person the inferior right of easement is merged in the higher title of ownership (c).

This principle is thus laid down by Bracton: “Nemini servire potest fundus suus proprius, quia prædiorum, aliud liberum, aliud servituti suppositum” (d). “Et talis dici poterit constitutio quâ domus domui, rus ruri, fundus fundo, tenementum tenemento, subjungatur: et non tantum personæ per se, vel tenementum per se, sed uterque simul, tam tenementum, quam personæ” (e). So in the French Code “A servitude is a charge imposed upon an heritage for the use and advantage of an heritage belonging to another proprietor” (f).

Meaning of quasi-easements.

The meaning of the term “quasi-easement,” which occurs in many modern authorities, is as follows. Where Blackacre and

conditione quisque fundus publicaretur.—Dig. 8, 3, 23, § 2, de serv. præd. rust.

Cum fundus fundo servit, vendito quoque fundo, servitutes sequuntur.—Dig. 8, 4, 12, comm. præd.

(b) *Leech v. Schweder*, 1874, 9 Ch. 474, 475, 476; 43 L. J. Ch. 487. Where the dominant tenement is transferred by an instrument, an appurtenant easement passes without special mention.—Co. Litt. 121 b; Shep. Touchstone, 89. It should be remembered that an easement may by deed be created for a term of years. *Kilgour v. Gaddes*, 1904, 1 K. B. 466; 73 L. J. K. B. 233; *Wheaton v. Maple*, 1893, 3 Ch. 65; 62 L. J. Ch. 963; *Booth v. Alcock*, 1873, 8 Ch. 663;

42 L. J. Ch. 557.

(c) Nulli enim res sua servit.—Dig. 8, 2, 26, de serv. præd. urb. Si quis ædes quæ suis ædibus servirent cum emisset, traditas sibi accepit, confusa sublataque servitus est.—Ibid. 30. See *Holmes v. Goring*, 1824, 2 Bing. 83; 2 L. J. C. P. 134; 9 Moore, 166; 27 R. R. 549; *James v. Plant*, 1836, 4 A. & E. 761; 6 L. J. Ex. 260; 43 R. R. 465. You cannot have an easement over your own land. *Metropolitan R. Co. v. Fowler*, 1892, 1 Q. B. 171; 62 L. J. Q. B. 553; *Kilgour v. Gaddes*, 1904, 1 K. B. 461; 73 L. J. K. B. 233.

(d) Lib. 4, f. 220.

(e) Ibid., f. 221.

(f) Code Civil, art. 637.

Whiteacre both belong to A., the common owner, and during his ownership an accommodation or privilege is enjoyed by Blackacre over Whiteacre, and A. subsequently parts with Blackacre to B. but retains Whiteacre, there passes to B. in certain cases a right to the above accommodation. This accommodation as it existed during the common ownership cannot in the strict sense be described as an "easement," but is usually described as a "quasi-easement" (*g*). Blackacre is sometimes described as the quasi-dominant tenement, and Whiteacre as the quasi-servient tenement (*h*).

SECT. 4.—*What must be the Nature of a Dominant Tenement.*

The dominant tenement usually consists of corporeal property. It was, however, laid down by Buckley, J., that an incorporeal right of way might be appurtenant to an incorporeal right of fishing. He adopted note 7 to Hargreave and Butler's edition of Co. Litt. 121 b that the true test of appurtenancy was the propriety of relation between the principle and the adjunct, which might be found out by considering whether they so agreed in nature and quality as to be capable of union without incongruity (*i*).

Nature of dominant tenement. Whether an easement can be appurtenant to an incorporeal hereditament.

In *Att.-Gen. v. Copeland* (*k*), a highway authority claimed an easement of discharging water on to the defendant's land by means of a pipe running from a highway. The action was dismissed by Alverstone, C.J., on the ground that the public right of passage over the road (*l*) was not such a right as was capable of having the easement claimed attached to it, and that therefore the claim to the easement failed for want of a dominant tenement. This decision was reversed by the Court of Appeal, on the ground that the pipe in question was a "drain" within the meaning of s. 67 of the Highway Act, 1835; Collins, M.R., adding "that a legal origin was possible, and ought to be presumed," for the right claimed, and the Lords Justices apparently concurring.

Applying the above-mentioned test, it is submitted that if the owner of a right to take certain minerals (*m*) under close A. obtained

(*g*) See *Wheeldon v. Burrows*, 1879, 12 Ch. D. 49; 48 L. J. Ch. 853; *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 841; 63 L. J. Q. B. 661; *Broomfield v. Williams*, 1897, 1 Ch. 617; 66 L. J. Ch. 655; *Browne v. Flower*, 1911, 1 Ch. 235; 80 L. J. Ch. 181; *Lewis v. Meredith*, 1913, 1 Ch. 579; 82 L. J. Ch. 255.

(*h*) *Suffield v. Brown*, 1864, 4 De G. J. & S. 194; 33 L. J. Ch. 249; 146

R. R. 267.

(*i*) *Hanbury v. Jenkins*, 1901, 2 Ch. 422; 70 L. J. Ch. 730.

(*k*) 1901, 2 K. B. 101; 70 L. J. K. B. 512. On appeal, 1902, 1 K. B. 690; 71 L. J. Ch. 472.

(*l*) See per Lord Cairns, L.J., *Rangeley v. Midland R. Co.*, 1868, 3 Ch. 310; 37 L. J. Ch. 313.

(*m*) The right to take minerals out of the soil of another is an incorporeal

from the owner of an adjacent close, B., a grant of a way over the close B., or a right to discharge water over it, for him, his heirs and assigns, as appurtenant to the right of mining, an easement would undoubtedly be created and would be appurtenant to the incorporeal right already vested in the grantee. It is clear that, if the grantee, in the case above supposed, was already the owner, not merely of the incorporeal hereditament, but of the substratum itself containing the minerals, and obtained such a grant from the owner of B., he would thus become entitled to an easement appurtenant to his soil; and what reason is there for holding that such would not also be the result in the case first put? If the question were raised in the form above suggested, the difficulty could not be evaded by holding that the first incorporeal right is enlarged by the grant of the second, and that both together form one entire right, as they would do if they had originally been conferred by the same grantor in one grant (*n*). Upon the question itself see the case of *Rowbotham v. Wilson* (*o*).

In connection with the above, reference should be made to the doctrine laid down in England that the grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment (*p*). Reference should also be made to the doctrine laid down in Ireland that the owner of a profit à prendre gets with it a right to everything necessary for its enjoyment (*q*). According to this doctrine, no question of appurtenancy would seem to arise in cases of the kind above referred to.

Probably in the English as in the civil law, the grant of an easement in respect of a house about to be purchased, or built, by the grantee, would enure as such. A familiar example of this is the case of a conveyance, by a landowner, of part of his land for the express purpose of building a house, in which case the land which he retains becomes affected by the easement of support for the house when built. "If the grant is made expressly to enable the grantee to

right; the right to a stratum of minerals is a corporeal right. *Doe v. Wood*, 1819, 2 B. & Ald. 724; 21 R. R. 469; *Wilkinson v. Proud*, 1843, 11 M. & W. 33; 63 R. R. 507; 12 L. J. Ex. 227; *Hamilton v. Graham*, 1871, L. R. 2 H. L. (Sc.) 166.

(*n*) The instance given above, with substantially the conclusions stated, was originally from the hand of Mr. Willes, a former editor.

(*o*) 1860, 8 H. L. C. 348; 30 L. J. Q. B. 49.

(*p*) *Jones v. Pritchard*, 1908, 1 Ch. 638; 77 L. J. Ch. 405. As to the words "reasonably necessary," see *Cope v. Sharpe*, 1911, 2 K. B. 842; 1912, 1 K. B. 504; 80 L. J. K. B. 1008; 81 L. J. K. B. 346.

(*q*) *Caldwell v. Kilkelly*, 1905, 1 I. R. 443; see *Liford's Case*, 1615, 11 Rep. 52; *Hinchcliffe v. Kinnoul*, 1838, 5 Bing. N. C. 24; 8 L. J. (N. S.) C. P. 105; 50 R. R. 579; *Pinnington v. Galland*, 1853, 9 Ex. 12; 22 L. J. Ex. 348.

build a house on the land granted, there is an implied warranty of support, subjacent and adjacent, as if the house had already existed" (r). And it would no doubt be held, in the case of a grant affecting one tenement with an easement in favour of another tenement, supposed to belong but not really belonging to the grantee at the time of the grant, that upon the grantee subsequently acquiring the tenement this grant would become effectual; but this is more properly a part of the law of estoppel (rr).

By the civil law, although it was clearly established that a servitude could be acquired only by the proprietor of the heritage to be benefited by it (s); yet where, at the date of the grant, there was an intention to erect the building to which the servitude was to be attached, the right so conferred was valid (t).

SECT. 5.—*In relation to a Dominant Tenement an Easement must be connected with its Enjoyment.*

According to the civil law it was necessary that a servitude should be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such benefit were merely a personal one to him (u). For the same reason no servitude could exist, unless the dominant and servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other (x).

Easement must be connected with enjoyment of dominant tenement.

(r) Per Lord Chancellor in *Caledonian R. Co. v. Sprot*, 2 Macqueen, 453. See the observations of Lord Wensleydale in *Rowbotham v. Wilson*, 8 H. L. C. p. 364; 30 L. J. Q. B. 49, upon a kindred point; and *Rymer v. McLroy*, 1897, 1 Ch. 528; 66 L. J. Ch. 336, where the grantee was a yearly tenant at the date of the grant and afterwards acquired the fee. And see *North British R. Co. v. Park Yard*, 1898, A. C. 643 (a Scotch case), where it was held that the fact that the dominant tenement had not been acquired at the date of the instrument granting a right of way did not prevent the servitude becoming a legal accessory to the dominant tenement.

(rr) See post, p. 35.

(s) Nemo enim potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium.—Inst. 2, 3, 3, de serv. præd.

(t) Future ædificio, quod nondum est, vel imponi vel acquiri servitus potest.—Dig. 8, 2, 23, § 1, de serv.

præd.

(u) Ut pomum decerpere liceat, et ut spatium, et ut cœnare in alienâ possimus, servitus imponi non potest.—Dig. 8, 1, 8. Ib.

(x) Quod si ædes meæ a tuis ædibus tantum distant ut prospici non possint; aut medius mons earum conspectum auferat, servitus imponi non potest.—Dig. 8, 2, 38, de serv. urb. præd.

Nemo enim propriis ædificiis servitutum imponere potest, nisi et is qui cedit, et is cui ceditur, in conspectu habeant ea ædificia, ita ut officere alterum alteri potest.—Dig. 8, 2, 39. Ib.

Neratius libris ex Plautio ait: nec haustum pecoris, nec appulsum, nec cretæ eximendæ, calcisque coquendæ, jus posse in alieno esse, nisi fundum vicinum habeat; et, hoc Proculum et Atilicium existimasse, ait.—Dig. 8, 3, 5, § 1, de serv. præd. rust.

In rusticis autem prædiis impedit servitutem medium prædium quod non servit.—Dig. 8, 3, 7. Ib.

So in English law an easement must be connected with the enjoyment of the dominant tenement (*y*) and must be for its benefit (*z*). Thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland (*a*).

In *Ackroyd v. Smith* (*b*) the defendants in an action of trespass *quare clausum fregit* pleaded a conveyance to A. of a certain close together with the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing *for all purposes* over the locus in quo, a conveyance by A. to themselves of the same close and its appurtenances, and a user by themselves "for their own purposes." On demurrer, the plaintiff had judgment on the ground that the right claimed, not being limited to purposes connected with the use and enjoyment of the close, could not be annexed to land so as to pass to a grantee as appurtenant to it.

Thorpe v. Brumfitt (*c*) is not inconsistent with *Ackroyd v. Smith*. There, Pollard was the owner of an inn; Morrell granted him, in exchange for an old right of way to the inn, a triangular piece of land adjoining the inn-yard and a right of way for all purposes through and along a certain road between the piece of land conveyed and a street. The Lords Justices held that the new way was capable of being made appurtenant to the land conveyed and passed with it; for, construing the grant reasonably, it meant a right of way between the highway and the yard of the inn, the triangular piece not being intended to be held as a separate tenement, but being granted only for the purpose of being thrown into the yard, so as to make it a more convenient boundary line between the properties of the grantor and grantees. Mellish, L.J., observed that, in *Ackroyd v. Smith*, the close to which it was sought to make the way appendant was not at the end of the road, and the purposes for which the right of way was there granted were to a great extent unconnected with the use of the close to which that right was claimed as appurtenant.

In *Bailey v. Stephens* (*d*) the principle of *Ackroyd v. Smith* was applied to a profit à prendre, and a claim of a prescriptive right in the owners or occupiers of close A. to enter close B. and to cut down

(*y*) *Ackroyd v. Smith*, 1850, 10 C. B. 164; 19 L. J. Q. B. 315; 84 R. R. 507. Compare the decisions as to profits à prendre (*Baylis v. Tyssen Amhurst*, 1877, 6 Ch. D. 500; 46 L. J. Ch. 718; *Chesterfield v. Harris*, 1908, 2 Ch. 424; 77 L. J. Ch. 688).

(*z*) *Att.-Gen. v. Horner* (No. 2), 1913,

2 Ch. 196; 82 L. J. Ch. 339.

(*a*) Per Byles, J., *Bailey v. Stephens*, 1862, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

(*b*) *Supra*.

(*c*) 1873, 8 Ch. 650.

(*d*) 1862, 12 C. B. N. S. 91; 31 L. J. C. P. 226; 133 R. R. 295.

and carry away and convert to their own use all the trees and wood growing and being thereon, as to close A. appertaining, was held void. "It is," said Erle, C.J., "a claim . . . of a right as appurtenant to the estate, and yet wholly unconnected with the estate . . . I cannot find any authority for such a claim." Probably such a right might be created by agreement, and be assignable, as a licence in gross coupled with a grant (e).

In *Ellis v. Bridgnorth* (f) a market had from time immemorial been held in the street of Bridgnorth before the plaintiff's house; and he claimed the right to have a stall on market days before his house. The defendants removed the market, and the plaintiff sued them for the disturbance of his right. The Court held that the right was probably conferred in consideration that the holding the market must necessarily diminish on market days the trade of the shops, and the shopkeepers were therefore privileged to advance their shops into the market; that the enjoyment of the stalls by them was sufficiently connected with the enjoyment of land to satisfy the rule of law acted upon in *Ackroyd v. Smith* and *Bailey v. Stephens*; and that, as the right originated in a grant from the owners of the market, their successors could not derogate from that grant by changing the site of the market-place (g).

In the case of *Bailey v. Appleyard* (h) it was intimated on high authority that a plea to turn cattle on land generally, without stating for what purpose, is bad. But all that the learned judge meant was, that it must be shown by proper averment in the pleading in what respect the right arises (i). He could not have intended that a plea of a right of common in gross would be bad; for it is clear that such a right may exist, and that a man may claim to be entitled, by grant or by prescription, to a right of pasture in gross, giving to him and his heirs, independently of the possession of any land or several pasture by them, the right of turning a definite and limited number of cattle upon the land over which the right of common is claimed (j).

(e) See above, p. 3.

(f) 1863, 15 C. B. N. S. 52; 32 L. J. C. P. 273; 137 R. R. 381.

(g) See further on this subject, *Kensit v. G. E. R.*, 1884, 27 Ch. D. 122; 52 L. J. Ch. 608, and cases there quoted.

It is no objection to an easement that its exercise may incidentally confer a benefit on some tenement other than the dominant tenement (*Simpson v. Godmanchester*, 1897, A. C. 696; 66 L. J. Ch. 770).

(h) 1838, 8 A. & E. 161, per Little-dale, J.; 47 R. R. 537; 7 L. J. (N. S.) Q. B. 145.

(i) See *Peter v. Daniel*, 1848, 5 C. B. 577; 17 L. J. C. P. 177.

(j) Blackstone, vol. 2, p. 34; *Welcome v. Upton*, 1840, 6 M. & W. 536; 55 R. R. 727; 8 L. J. Ex. 267; *Barrington's Case*, 1611, 8 Rep. 136b; *Bailey v. Stephens*, 1862, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

SECT. 6.—*An Easement must be an Incident of a known and usual kind.*

Easement must be an incident of known and usual kind.

It was said by Lord Brougham that it must not be supposed that incidents of a novel kind can be attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given (*k*). Thus the exclusive right of letting pleasure-boats on a canal for hire could not be created as an easement (*l*). The right of using a garden for enjoyment was said by Farwell, J., to be a mere *jus spatiandi*, a right the existence of which was not known to the law (*m*).

On the other hand, it has been laid down in the House of Lords that the category of easements must expand with the circumstances of mankind (*mm*). Again, while there may be a limit to the creation of easements, there are a number of cases to which the maxim that no one can derogate from his own grant is applied, and where, although no easement is created, an obligation on the part of the grantor arises analogous to a restrictive covenant, e.g., where land is granted for a particular purpose (*n*).

SECT. 7.—*In relation to the Servient Tenement, Easements are imposed upon Corporeal Property, and not upon the Person of the Owner of it.*

Easements are imposed on property, not persons.

The right conferred by an easement attaches upon the soil of the servient tenement; the utmost extent of the obligation imposed upon the owner being not to alter the state of it so as to interfere with the enjoyment of the easement by the dominant (*o*).

The obligation upon him is in fact negative—to suffer or not to do—ceasing altogether upon his ceasing to be the owner of the

(*k*) *Keppell v. Bailey*, 1834, 2 My. & K. 535; 39 R. R. 264; *Hill v. Tupper*, 1863, 2 H. & C. 121; 133 R. R. 605; 32 L. J. Ex. 217; *Aspden v. Seddon*, 1876, 1 Ex. D. 509; 46 L. J. Ex. 353.

(*l*) *Hill v. Tupper*, 1863, 2 H. & C. 121; 32 L. J. Ex. 217; 133 R. R. 605.

(*m*) *International Tea v. Hobbs*, 1903, 2 Ch. 172; 72 L. J. Ch. 543. See *Att.-Gen. v. Antrobus*, 1905, 2 Ch. 198; 74 L. J. Ch. 599. It is believed, however (as in the case of the London squares), that leases frequently contain provisions creating a right of this kind to be enjoyed by the inhabitants of a particular messuage; and the validity of such a right seems clear.

(*mm*) *Dyce v. Hay*, 1852, 1 Macq. 313. The words were applied by the

Privy Council, while holding that the right to store trade goods on reclaimed land was a good easement. *A.-G. South Nigeria v. John Holt*, 1915, A. C. 617.

(*n*) See the judgment of Parker, J., in *Browne v. Flower*, 1911, 1 Ch. 226; 80 L. J. Ch. 181, and the cases there referred to. See ante, p. 2.

(*o*) *Taylor v. Whitehead*, 1781, 2 Doug. 745; and see *Pomfret v. Ricroft*, 1669, 1 Saund. 321; *Bullard v. Harrison*, 1815, 4 M. & S. 387; 16 R. R. 493. Vide post, Incidents of Easements.

In omnibus servitutibus reffectio ad eum pertinet qui sibi servitutem asserit, non ad eum cujus res servit.—Dig. 8, 5, 6, § 2, si serv. vind.

servient heritage (*p*); and passing with the servient heritage, upon its transfer, to each successive proprietor (*q*).

So completely is this the case that, if any disturbance of an easement has taken place previous to a transfer of the servient heritage, although such tortious act would give a right of action against the former owner, his successor is also liable if he allows it to continue (*r*).

SECT. 8.—*As to the Rule that an Easement cannot confer the Exclusive use of the Servient Tenement.*

There is no easement known to the law which gives exclusive and unrestricted use of a piece of land. A grant of the exclusive or unrestricted use of land beyond all question passes the ownership of that land (*s*). Similarly it seems that there can be no easement which could prevent the owner of the servient tenement from making ordinary use of his land, at least so far as not inconsistent with the proper use of an easement (*t*). The distinction between an easement and the ownership of land was discussed by Kay, J., in *Metropolitan R. Co. v. Fowler* (*u*); and the distinction between an easement and the occupation of land for rating purposes was discussed in *Holywell v. Halkyn* (*x*). In this matter some further distinctions require to be noticed. An agreement granting to A.

Easement cannot confer exclusive use of servient tenement.

(*p*) Aio esse jus, quo dominus aliquid pati in suo, aut in suo non facere, cogitur, ex naturâ omnium servitutum. Pati in suo, puta re suâ utentem, fruentem, per fundum suum euntem, agentem, aquamve ducentem, tignum in ædes suas immittentem. Non facere, veluti altius non ædificare, in suo non ponere quod luminibus ædium nostrarum aut prospectui officiat, &c. Planè enim ita servitus constitui non potest, ut quis aliquid cogatur facere in suo; puta viridaria aut arbores prospectus nostri causâ tollere, aut in suo pingere, quo amaniorem nobis prospectum præstet, obligatio hæc erit, non servitus constituta; et ideo, prædio alienato, non sequetur actio novum possessorem, ut fit ubi servitus constituta est; sed in eum, qui id facere promisit, hæredemque ejus, actio in personam dabitur in id scilicet, quod interest, si non fiat quod promissum est, ut accidit in omni obligatione faciendâ.—Vinnius, ad Inst. lib. 2, tit. 3; Dig. 8, l. 10, § 1, de serv.

(*q*) Non ignorabis, si priores possessores, aquam duci per prædia prohibere jure non potuerint, cum eodem onere deferendæ servitutis, transire ad emp-

tores eadem prædia posse.—Cod. 3, 34, 3, de serv. et ag.

(*r*) *Penruddock's Case*, 1598, 5 Rep. 100; and post, Remedies for Disturbance.

(*s*) Per Lopes, L.J., *Reilly v. Booth*, 1890, 44 Ch. D. 36, adopted in *H. L.*, *Metropolitan R. Co. v. Fowler*, 1893, A. C. 428; 62 L. J. Q. B. 553; *Capel v. Buszard*, 1829, 6 Bing. 159; 6 L. J. K. B. 267; 32 R. R. 359, 361.

(*t*) See *Dyce v. Hay*, 1852, 1 Macqueen, 309; *St. Mary, Newington v. Jacobs*, 1871, L. R. 7 Q. B. 53.

(*u*) 1892, 1 Q. B. 181; 62 L. J. Q. B. 553. See also *Wood v. Lake*, 1763, 13 M. & W. 848, n.; *Taylor v. Waters*, 1817, 7 Taunt. 374; 18 R. R. 499; *Jones v. Flint*, 1839, 10 A. & E. 753; 9 L. J. (N. S.) Q. B. 252; 50 R. R. 527; *Tunbridge Wells v. Baird*, 1896, A. C. 437; 65 L. J. Q. B. 451; *Westminster v. Johnson*, 1904, 2 K. B. 745; 73 L. J. K. B. 774; (land tax); *Ystradyfodwg v. Bensted*, 1907, 1 K. B. 499; 76 L. J. K. B. 282; (income tax).

(*x*) 1895, A. C. 131; 64 L. J. M. C. 113.

the exclusive privilege of advertising in certain parts of a theatre was held to be a mere licence and not to confer upon A. any easement (*y*). On the other hand, a licence to have the exclusive use of a vault for burial has been described as an easement (*z*). Similarly the exclusive right of sending gas through pipes, or sewage through a drain (*a*).

SECT. 9.—*Easements confer no right to a Participation in the Profits of the Servient Tenement.*

Easements
confer no
right to
profits.

Easements are specifically distinguished from other incorporeal hereditaments by the absence of all right to participate in the profits of the soil charged with them.

The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common (*b*); but the right to take "something out of the soil" is a profit à prendre, and not an easement (*c*).

The servitude of the civil law had a much wider signification: comprehending, in addition to the easements proper of the English law, many rights which in it fall under the division of profits à prendre (*d*).

SECT. 10.—*By the Civil Law the Causes of Easements must be Perpetual.*

Civil law.

By the civil law the causes of easements must be perpetual (*e*).

It is not to be understood by this position that the civil law required the enjoyment of an easement to be continuous and necessarily perpetual, conditions which in many cases would be obviously

(*y*) *Warr v. London County Council*, 1909, 1 K. B. 721; 73 L. J. K. B. 362.

(*z*) *Bryan v. Whistler*, 1828, 8 B. & C. 288; 6 L. J. K. B. 302; 32 R. R. 389. See *Moreland v. Richardson*, 1856, 22 Beav. 596; 26 L. J. Ch. 690; 116 R. R. 18.

(*a*) *Southport v. Ormskirk*, 1894, 1 Q. B. 201; 63 L. J. Q. B. 250. See further Part IV., Chap. 3, post.

(*b*) Blackstone (Christian's), vol. 2, p. 18; and the judgment in *Race v. Ward*, 1855, 4 E. & B. 702; 24 L. J. Q. B. 153; in which case it was held that the right to go upon a neighbour's land and take water out of a spring there is an easement, and not a profit à prendre.

(*c*) *Manning v. Wasdale*, 1836, 5 A. & E. 764; 44 R. R. 576; 6 L. J. (N. S.) K. B. 59; *Blewett v. Tregonning*, 1835,

3 A. & E. 575; 42 R. R. 463, Preface, vi.; 4 L. J. K. B. 234; *Bailey v. Appleyard*, 1838, 8 A. & E. 161; 47 R. R. 537; 7 L. J. (N. S.) K. B. 145. See *Race v. Ward*, ubi sup.; *Constable v. Nicholson*, 1863, 14 C. B. N. S. 230; 32 L. J. C. P. 240.

(*d*) Ante, p. 2, note (*c*).

(*e*) Foramen in imo pariete conclavis vel triclirii quod esset proluendi pavimenti causâ, id neque flumen esse, neque tempore acquiri, placuit. Hoc ita verum est si in eum locum nihil ex cœlo aquæ veniat: neque enim perpetuam causam habet, quod manu fit; at quod ex cœlo cadit, etsi non assidue fit, ex naturali tamen causâ fit, et ideo perpetuo fieri existimatur. Omnes autem servitutes prædiorum perpetuas causas habere debent; et ideo, neque ex lacu, neque ex stagno, concedi aquæ ductus potest. Stillicidii quoque immittendi

impossible (*f*); but only that the qualities thus impressed upon the dominant and servient tenements should be in their nature permanent, and such as were capable of continuing in their present condition for an indefinite period.

If, from the nature of the servient tenement, the enjoyment could only continue during a limited space of time, as where water was drawn from a mere artificial collection, no servitude was acquired.

The rule laid down by Vinnius is, "That a servitude has a perpetual cause where it is natural, though not constant, as rainwater, which falls naturally, though not constantly; and that those servitudes which arise by the act of man have also a perpetual cause, if the tenement, or any part of it, has been adapted or prepared (*parata*) for its enjoyment, as the immission of smoke" (*g*).

Bracton appears to have recognised this as an essential element: after laying it down that a man may have an assize for disturbance of his "*haustus aquæ*," he continues, "*Sed hoc (breve) non est de cisterna, quia cisterna non habet aquam perpetuam, nec aquam vivam, quia cisterna imbris concipitur*" (*h*).

English law.

The want of direct authority upon this point in the law of England (*i*), renders it difficult to determine to what extent this principle is admitted by it; and even in the civil law it is by no means easy to define the rule with precision. For though it is there laid down that nothing which depended upon the mere act of man (*quod manu fit*), as a discharge through an aperture in the wall of water used in washing the pavement, could constitute a servitude, it seems clear that a servitude might be acquired to discharge smoke and steam arising from hot baths, the use of which would obviously be of equally uncertain duration, and arising directly from the hand of man (*k*). Perhaps the apparent incon-

Difficulties in applying the rule.

naturalis et perpetua causa esse debet.—Dig. 8, 2, 28, de serv. præd. urb.

Servitus aquæ ducendæ, vel hau-riendæ, nisi ex capite, vel ex fonte constitui non potest.—Dig. 8, 3, 9, de serv. præd. rust.

(*f*) *Tales sunt servitudes, ut non habeant certam continuamque possessionem; quia nemo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.*—Dig. 8, 1, 14, de serv.

(*g*) *Perpetuum illis est quodcumque ex naturali causâ oritur etsi non sit assiduum, ut ecce, aqua pluvia ex naturali causâ oritur, etsi non assiduè pluit; quod enim naturaliter fit, perpetuum*

videtur, licet non fiat assiduè, ut defectio lunæ. Sed et quod ex facto nostro oritur, perpetuum habetur, si ejus causâ prædium aut pars prædii parata est, ut fumi immissio.—Vinnius, ad Inst. lib. 2, tit. 3.

(*h*) Lib. 4, f. 233.

(*i*) See below, p. 24.

(*k*) *Nam et in balineis inquit vaporibus, cum Quintilla cuniculum pergenterem in Ursi Julii instruxisset, placuit, potuisse tales servitudes imponi.*—Dig. 8, 5, 8, § 7, si serv. vind. The observation in the text also applies to a right of sewerage, which, according to the civil law, may constitute a valid servitude.—Dig. 8, 1, 7, de serv.

sistency may be explained by considering that, in the first instance, the tenement from which the water is discharged is regarded as the servient one, and the rule prevents the adjoining owner from insisting on a continuance of the discharge; while in the second instance the tenement discharging the smoke is the dominant one, and the rule does not apply. If the owner of the tenement receiving the smoke were (per impossibile) to insist on its continuing to ascend into his room, the rule in question would become applicable, and would be an answer to his claim. "Cause" in these instances seems to mean origin or motive power.

And now the rule, so far as it extends to the servient tenement, has been, not expressly but in fact, adopted in the English courts, and is illustrated by the cases of *Arkwright v. Gell* (l), *Wood v. Waud* (m), *Greatrex v. Hayward* (n), *Gaved v. Martyn* (o), *Mason v. Shrewsbury* (p), *Rameshur v. Koonj* (q), and *Burrows v. Lang* (r)—all of which are discussed below (s).

"The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation. The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right" (t).

(l) 1839, 5 M. & W. 203; 52 R. R. 671; 8 L. J. (N. S.) Ex. 201.

(m) 1849, 3 Exch. 748; 77 R. R. 809; 18 L. J. Ex. 305.

(n) 1853, 8 Exch. 291; 91 R. R. 493; 22 L. J. Ex. 137.

(o) 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 354.

(p) 1871, L. R. 6 Q. B. 578; 40 L. J.

Q. B. 293.

(q) 1878, 4 App. Cas. 121.

(r) 1901, 2 Ch. 502; 70 L. J. Ch. 607.

(s) Part III., Chap. 1. Cf. *N. E. R. v. Elliott*, 1860, 1 J. & H. 145; 10 H. L. C. 333; and *McEvoy v. G. N. R.*, 1900, 2 I. R. 325.

(t) Per Pollock, C.B., 3 Exch. 777.

The rule in *Arkwright v. Gell* (*u*) has not up to this time been applied to any easement other than the right to receive water; and the instances given in the authorities on the civil law all concern the same easement. But it is conceivable that the same question might be raised with reference to other claims: for instance, with reference to a right of way over a structure erected for temporary purposes. And it is conceived that the rule, which rests on a reasonable basis, would always be applied in a proper case.

The question here discussed may be thought to have a bearing on the subject of support to buildings by buildings, which will be considered later (*x*).

There is one English case in which a like rule seems to have been applied to the dominant tenement. In *Maberly v. Dowson* (*y*), a predecessor in title of the plaintiff had erected a manufactory or workshop upon pillars fixed into stone plinths, which stone plinths rested upon brickwork the bottom of which was three feet below the level of the ground. A window in this workshop had remained unobstructed for more than twenty years; and the plaintiff claimed to have an ancient light there. The Court disallowed the claim. "This building was not attached to the freehold, but was a mere contrivance for temporary purposes, and would not pass with the inheritance. The Court do not decide what the plaintiff's right would have been had this building been a part of the freehold; but we think, considering the nature of the building, that it is impossible to infer the consent of the owner or occupier of the adjoining land, and therefore that there should be judgment for the defendant."

*Maberly v.
Dowson.*

(*u*) *Supra*, p. 24.

(*x*) Part III., Chap. 6, sect. 3.

(*y*) 1827, 5 L. J. K. B. 261.

CHAPTER III.

SUBJECTS OF EASEMENTS.

Variety of easements.

THE number of modifications of rights of this kind may be infinite both in their extent and mode of enjoyment, as the convenience of man in using his property requires (*a*). "To descend now," says Lord Stair, "to the kinds of servitudes, there may be as many as there are ways whereby the liberty of a house or tenement may be restrained in favour of another tenement; for liberty and servitude are contraries, and the abatement of the one is the being or enlarging of the other."

Affirmative and negative.

From the civil law may be taken a practically useful division of easements into two principal classes, which may be termed affirmative and negative. Those coming under the head of affirmative easements authorize the commission of acts which, in their very inception, are positively injurious to another—as a right of way across a neighbour's land, or a right to discharge water—every exercise of which rights may be the subject of an action. Negative easements are injuries consequentially only—restricting the owner of the soil in the exercise of the natural rights of property—as where he is prevented building on his own land to the obstruction of lights. With respect to this latter class, it is evident that no cause of action can arise from their exercise. A cause of action arises only where their enjoyment is obstructed.

Affirmative.

The English law furnishes the following amongst other instances of affirmative easements :—

Rights of way.

Right to place over neighbouring land clothes on lines (*b*), or telephone wires (*c*).

(*a*) Nullum est dubium quia plures esse possint hujus generis servitudes, pro diversâ ratione ædificandi et habitantium necessitate.—Heineccius, *El. J. C.*, Lib. 8, § 148. The above principle is supported by the words of Lord St. Leonards in *Dyce v. Hay*, 1852, 1 Macq. 313, and of Lord Shaw in *A.-G. South Nigeria v. John Holt*, 1915, A. C. 617. See, however, the limitation suggested by the rule, ante, p. 20, and the cases

there referred to.

(*b*) *Drewell v. Towler*, 1832, 3 B. & Ad. 735; 1 L. J. K. B. 228.

(*c*) *Lancashire Co. v. Manchester*, 1884, 14 Q. B. D. 267; 54 L. J. M. C. 63; see *Wandsworth v. United Telephone Co.*, 1883, 13 Q. B. D. 904; 53 L. J. Q. B. 449; *Midland R. Co. v. Wright*, 1901, 1 Ch. 783; 70 L. J. Ch. 411; *Finchley Co. v. Finchley Council*, 1903, 1 Ch. 437; 72 L. J. Ch. 297.

Right to move a timber traveller through air over neighbouring land (*d*); or to build so as to project over neighbouring land (*e*); or to cause bowsprits of vessels in dock to project over adjoining land (*f*).

Right to tunnel under another's land (*g*).

Right to let down the surface of land by mining under it (*h*).

Right in working mines to make spoil banks on surface (*i*) or quarries (*k*).

Right to mix muck on a neighbour's land (*l*).

Right to deposit on a neighbour's land house refuse, or trade goods (*m*).

Right to place an advertisement hoarding on land (*n*), or to place a signpost on a common (*o*).

Right to nail fruit trees on a neighbour's wall (*p*).

Right to fix and maintain a name-plate upon the door of a neighbour's house (*q*).

Right to use a fascia on a neighbour's house (*r*).

Right to fix a signboard on a neighbour's house (*s*).

Right to use the chimney of a neighbour's house for the passage of smoke (*t*).

(*d*) *Harris v. De Pinna*, 1886, 33 Ch. D. 251; 56 L. J. Ch. 344.

(*e*) *Lemmon v. Webb*, 1894, 3 Ch. 1; 1895, A. C. 1; 64 L. J. Ch. 205; distinguishing the case of overhanging trees.

(*f*) *Suffield v. Brown*, 1864, 33 L. J. Ch. 249.

(*g*) *South Eastern R. v. Associated Portland*, 1910, 1 Ch. 24, 25; 79 L. J. Ch. 150; the right which was described by Eady, J., as an easement was referred to by Farwell, L. J., as a personal contract (*ib.*). Compare *Re Pearson*, 1900, 83 L. T. 626, where a sale to a railway company of the right to construct and use tunnels under settled land was treated as being a sale not of an easement but of part of the land. Again, in *Metropolitan R. Co. v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553, the interest of the company in tunnels constructed by them under their special Act was held to be not merely an easement but an interest in land—a "hereditament" chargeable with land tax.

(*h*) *Rowbotham v. Wilson*, 1860, 8 H. L. C. 362; 30 L. J. Q. B. 49; 125 R. R. 192; *Sitwell v. Londesborough*, 1905, 1 Ch. 460; 74 L. J. Ch. 254.

(*i*) *Rogers v. Taylor*, 1857, 1 H. & N. 706; 26 L. J. Ex. 203; 108 R. R. 788;

Cardigan v. Armitage, 1823, 2 B. & C. 197; 26 R. R. 313; *Marshall v. Borrodaile*, 1892, 8 Times L. R. 275; *Ramsay v. Blair*, 1875, 1 App. Cas. 701.

(*k*) *Middleton v. Clarence*, 1. R. 11 Ch. 499.

(*l*) *Pye v. Mumford*, 1848, 11 Q. B. 666; 17 L. J. Q. B. 138; 75 R. R. 582.

(*m*) *Foster v. Richmond*, 1910, 9 L. G. R. 65; *A.-G. South Nigeria v. John Holt*, 1915, A. C. 617.

(*n*) *R. v. St. Pancras*, 1877, 2 Q. B. D. 581; 46 L. J. M. C. 243.

(*o*) *Hoare v. Metropolitan Board*, 1874, L. R. 9 Q. B. 296; 43 L. J. M. C. 65; *Hoare v. Lewisham*, 1901, 85 L. T. 281.

(*p*) *Hawkins v. Wallis*, 1763, 2 Wils. 173.

(*q*) *Lane v. Dixon*, 1847, 3 C. P. 776; 16 L. J. C. P. 129; 71 R. R. 484.

(*r*) *Francis v. Hayward*, 1882, 22 Ch. D. 177; 52 L. J. Ch. 12; *Reilly v. Booth*, 1890, 44 Ch. D. 12.

(*s*) *Moody v. Steggles*, 1879, 12 Ch. D. 261; 48 L. J. Ch. 639.

(*t*) *Hervey v. Smith*, 1855, 1 K. & J. 389; 22 Beav. 299; 103 R. R. 141; see *Tebb v. Cave*, 1900, 1 Ch. 643; 69 L. J. Ch. 282; *Jones v. Pritchard*, 1908, 1 Ch. 630; 77 L. J. Ch. 405.

- Right to use the kitchen of a neighbour's house for washing (*u*).
 Right to deposit merchandise in a neighbour's passage, to hoist it thence into a window, and for that purpose to swing shutters over the passage (*x*).
 Right of landing nets on another's land (*y*).
 Right to place a pile in the bed of a river (*z*).
 Right to place stones on the foreshore for protection of adjoining land (*a*).
 Right to go on the land of another to clear a mill-stream and repair its banks (*b*); or to open locks in time of flood (*c*); or to fish (*d*).
 Right for the occupier of a messuage to water cattle at a pond and take water for domestic purposes (*e*).
 Right to go on a neighbour's land and draw water from a spring there (*f*), or from a pump (*g*).
 Right to discharge rainwater by a spout or projecting eaves (*h*).
 Right to discharge polluted water into another's watercourse (*i*).
 Right to take water across a neighbour's land by an artificial watercourse (*k*).
 Right to use or affect the water of a natural stream in manner not justified by a natural right, e.g., by placing a fishing weir therein (*l*).
 Right to place a fender in mill-stream to prevent waste of water (*m*).
 Right to commit a private nuisance by discharging coal dust

(*u*) *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357; 53 L. J. Ch. 492.

(*x*) *Richardson v. Pond*, 15 Gray (Mass.), 387.

(*y*) *Gray v. Bond*, 1821, 2 Brod. & Bing. 667; 23 R. R. 530.

(*z*) *Lancaster v. Eve*, 1859, 5 C. B. N. S. 717; 28 L. J. C. P. 235; 116 R. R. 840; *Cory v. Greenwich*, 1872, L. R. 7 C. P. 499; 41 L. J. M. C. 142.

(*a*) *Philpot v. Bath*, 1905, W. N. 114; 21 Times L. R. 634.

(*b*) *Beeston v. Weate*, 1856, 5 E. & B. 986; 25 L. J. Q. B. 115; 103 R. R. 835; *Peter v. Daniel*, 1848, 5 C. B. 568; 17 L. J. C. P. 177; *Roberts v. Fellowes*, 1906, 94 L. T. 279.

(*c*) *Simpson v. Godmanchester*, 1897, A. C. 696; 66 L. J. Ch. 770.

(*d*) *Hanbury v. Jenkins*, 1901, 2 Ch. 401; 70 L. J. Ch. 730.

(*e*) *Manning v. Wasdale*, 1836, 5

A. & E. 758; 6 L. J. (N. S.) K. B. 59; 44 R. R. 576; *Fitch v. Rawling*, 1795, 2 H. Bl. 395; 3 R. R. 425.

(*f*) *Race v. Ward*, 1855, 4 E. & B. 702; 24 L. J. Q. B. 153; 99 R. R. 702.
 (*g*) *Polden v. Bastard*, 1865, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92.

(*h*) *Harvey v. Walters*, 1872, L. R. 8 C. P. 162; 42 L. J. C. P. 105.

(*i*) *Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 41 R. R. 788.

(*k*) *Beeston v. Weate*, sup.; *Goodhart v. Hyatt*, 1883, 25 Ch. D. 182; 53 L. J. Ch. 219.

(*l*) *Rolle v. Whyte*, 1868, L. R. 3 Q. B. 302, where a "qualified easement" of this nature was acquired; *Leconfield v. Lonsdale*, 1870, L. R. 5 C. P. 657; 39 L. J. C. P. 305.

(*m*) *Wood v. Hewett*, 1846, 8 Q. B. 913; 15 L. J. Q. B. 247; 70 R. R. 689.

over another's land (*n*); or by creating noise (*o*); or by polluting water (*p*); or by polluting air by smoke or smell (*q*).
 Right to bury in a particular vault (*r*).
 Right to pew in a church (*s*).

The principal negative easements are :—

Negative.

Right to receive light by ancient apertures.
 Right to receive air by a defined channel (*t*).
 Right of support for buildings from land (*u*); or from buildings (*x*).
 Right to receive a flow of water in an artificial stream (*y*).

Restrictive covenants have been said to bind in equity the land affected by them, as being in the nature of negative easements (*z*).

Easements may also be divided into continuous and discontinuous, and into apparent and non-apparent.

Continuous and discontinuous.

Continuous servitudes are those of which the enjoyment is or may be continual, without the necessity of any actual interference by man; as the right to send water through a watercourse or to discharge water on to a neighbour's land. Discontinuous servitudes are those the enjoyment of which can only be had by the interference of man, as rights of way, or a right to draw water from a well (*a*).

“ Apparent servitudes are those the existence of which is shown by external works (*ouvrages extérieurs*), as a door, a window, a watercourse. Non-apparent servitudes are those which have no external sign of their existence; as the prohibition to build on particular land, or to build above a certain height ” (*b*).

Apparent and non-apparent.

(*n*) *Royal Mail Co. v. George*, 1900, A. C. 480; 69 L. J. P. C. 107; *Woodman v. Pulbach*, 1914, 111 L. T. 169.

(*o*) *Elliston v. Featham*, 1835, 2 Bing. N. C. 134; 42 R. R. 557; *Ball v. Ray*, 1873, 8 Ch. 471.

(*p*) *Bazendale v. McMurray*, 1867, 2 Ch. 790.

(*q*) *Crump v. Lambert*, 1867, 3 Eq. 409.

(*r*) *Bryan v. Whistler*, 1828, 8 B. & C. 288; 6 L. J. K. B. 302; 32 R. R. 389; *Moreland v. Richardson*, 1856, 22 Beav. 596; 25 L. J. Ch. 883.

(*s*) See Best on Presumptions, p. 111; *Dauney v. Dee*, 1621, Cro. Jac. 605; *Hinde v. Charlton*, 1866, L. R. 2 C. P. 104; 36 L. J. C. P. 79; *Brumfitt v. Roberts*, 1870, L. R. 5 C. P. 224; 39 L. J. C. P. 95; *Greenway v. Hockin*, 1870, L. R. 5 C. P. 235; 39 L. J. C. P. 103; *Crisp v. Martin*, 1876, 2 P. D. 15; *Philipps v. Halliday*, 1891, A. C. 228;

61 L. J. Q. B. 210; *Stileman-Gibbard v. Wilkinson*, 1897, 1 Q. B. 749; 66 L. J. Q. B. 215.

(*t*) *Bass v. Gregory*, 1890, 25 Q. B. D. 481; 59 L. J. Q. B. 574.

(*u*) *Dalton v. Angus*, 1881, 6 App. Cas. 740; 50 L. J. Q. B. 689.

(*x*) *Tone v. Preston*, 1883, 24 Ch. D. 739; 53 L. J. Ch. 50; *Lemaitre v. Davis*, 1881, 19 Ch. D. 281; 51 L. J. Ch. 173; *Waddington v. Naylor*, 1889, 60 L. T. 480.

(*y*) *Rameshur v. Koonj*, 1878, 4 App. Cas. 121, 126; *Kensit v. G. E. R.*, 1884, 27 Ch. D. 134; 54 L. J. Ch. 19; *Baily v. Clark*, 1902, 1 Ch. 649; 71 L. J. Ch. 396.

(*z*) *Re Nisbet and Potts*, 1906, 1 Ch. 402, 406; 75 L. J. Ch. 238. See *Rowbotham v. Wilson*, 1860, 8 H. L. C. 362; 30 L. J. Q. B. 49; 125 R. R. 192.

(*a*) Code Civil, art. 688.

(*b*) Code Civil, art. 689. These dis-

This illustration of a "door" seems inexact. By "signe apparent" appears to be meant not merely some visible indication of the intention to use an easement, but some permanent change of one or other of the tenements, indicating that one is subjected necessarily to the convenience of the other. A "door," considered as an opening for the use of a right of way, would not satisfy this condition. "There are," says Merlin, "some servitudes, which are called non-apparent (*cachées*), which manifest themselves by an exterior sign; as, for example, where I have a right of way in the court or garden of my neighbour, and I have a door which announces this right of way" (*d*).

Urban and
rustic servi-
tudes.

The leading division of prædial servitudes in the civil law, but which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes—the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country.

The rustic servitudes comprised rights of way and watercourses and rights to drive cattle to water (*e*); the urban servitudes comprehended all those which belonged to a building, as eaves-droppings, support of beams, rights to light (*f*).

tinctions were first found in the Code Civil: per Lord Blackburn, *Dalton v. Angus*, 6 App. Cas. 821. According to Lord Westbury a "continuous" easement means something the use of which is constant and uninterrupted. An "apparent" easement means something of the existence of which there is some sign (*Suffield v. Brown*, 1864, 4 D. J. & S. 199; 33 L. J. Ch. 249; 146 R. R. 267). Again, it has been said that an "apparent" easement means not only one which must necessarily be seen, but one which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*Pyer v. Carter*, 1857, 1 H. & N. 922; 26 L. J. Ex. 258; 108 R. R. 896). Instances of easements which are treated as being apparent and continuous are found in a watercourse (*Watts v. Kelson*, 1871, 6 Ch. 174; 40 L. J. Ch. 126); a formed road (*Brown v. Alabaster*, 1887, 37 Ch. D. 507; 57 L. J. Ch. 255); a tramway (*Brazier v. Glasspool*, 1901, W. N. 237); and the right to light. Instances of easements which are treated as being not apparent and continuous are found in the right to draw water

from a well (*Polden v. Bastard*, 1865, L. R. 1 Q. B. 161; 35 L. J. Q. B. 92; 147 R. R. 374); and an ordinary right of way where there is no formed road.

(*d*) Répertoire de Jurisprudence, tit. Servitude, p. 50. The case above suggested by Merlin is precisely that of *Pheysey v. Vicary*, 1847, 16 M. & W. 484; 73 R. R. 583, substituting for a "door" a visible hard carriage drive.

(*e*) Porro autem ud prædia vel rustica sunt vel urbana, ita quoque et servitudes quæ iis inhaerent, vel rusticae sunt, vel urbanae. Prædia rustica sunt, loca ædificiis, vacua, in urbe area, ruri ager; non enim loco, sed materie et genere, distinguuntur.—Vinnius, ad Inst. lib. 2, tit. 3.

Rusticorum prædiorum jura sunt hæc; iter, actus, via, aquæ ductus.—Inst. 2, 3, præf.

Inter rusticorum prædiorum servitudes quidam computari recte putant, aquæ haustum, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.—Ib. § 2.

(*f*) Prædiorum urbanorum servitudes sunt hæc, quæ ædificiis inhaerent; ideo urbanorum prædiorum dictæ quoniam

PART II.

OF THE ACQUISITION OF EASEMENTS.

INTRODUCTION.

THE origin of some easements is as ancient as that of property. One tenement may be subjected to the convenience of another by the hand of nature itself; the inferior elevation of one in relation to the other may subject it to the fall of water from the higher ground. A similar disposition may be produced by the act of man permanently changing their previous relation, and thus affixing to them qualities with which they were not originally invested; as when, by the erection of buildings, water is discharged upon the neighbouring land, or light and air are received through a window. Other easements involve no apparent change in the condition of the two tenements, but exist only by a repetition of the acts of man, as rights of way.

Origin of easements.

“The origin of servitudes,” says an eminent French writer, “is as ancient as that of property, of which they are a modification. By their natural disposition the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the soil recognized the indispensable necessity of such subjections. When the extension of cultivation brought men nearer together, and the want of a common defence formed the first society, public utility and safety led to the conviction, that it was necessary to restrict in certain cases rights legitimate in themselves, but the absolute exercise of which by individuals could not take place, without rendering some properties almost valueless. In a short time similar rights were stipulated for by private persons,

ædificia omnia urbana prædia appellamus, etsi in villâ (in the country, Dig. 50, 15, 211) ædificata sint. Item urbanorum prædiorum servitutes sunt, ut vicinus onera vicini sustineat, ut in parietem ejus liceat vicino tignum immittere, ut stillicidium vel flumen recipiat quis in ædes suas, vel in aream, vel in cloacam, ne altius quis tollat ædes

suas, ne luminibus vicini officiat.—Ib. § 1.

Et denique projiciendi, protegendique.—Dig. 8, 2, 2, de serv. præd. urb.

Jus cloacæ mittendæ servitus est.—Dig. 8, 1, 7, de serv.

Est et hæc servitus ne prospectui officiat.—Dig. 8, 2, 3, de serv. præd. urb.

as matter of utility, or even pleasure. Thus, from the disposition of nature, the wants of society, and the agreements of individuals, have originated prædial servitudes" (a).

Civil law.

By the civil law, the origin of servitudes was referred to "lex, natura loci, vetustas" (b).

Law of
England.

By the law of England, the origin of rights of this kind, other than the "natural" or common law rights above described, is referred either to an express contract between the parties, or to a similar contract implied from the peculiar relation of the parties, or from the long-continued exercise of the right (c).

The cases of express agreement present, for the most part, but little difficulty, as far, at least, as concerns the mere extent of the right so conferred. The greater proportion of easements rest on implied agreements, the terms and conditions of which can be collected only from the actual amount of enjoyment proved to have been had.

(a) Pardessus, *Traité des Servitudes*, S. 1.

(b) In summâ tria sunt per quæ inferior locus superiori servit. Lex, natura loci, vetustas, quæ semper pro lege habetur; minuendarum scilicet litium causâ.—Dig. 39, 3, 2, de aq. et aq. pl. arc.; Cod. 7, 22, 2, de longi temporis.

(c) See the judgment of Littledale, J., in *Moore v. Rawson*, 1824, 3 B. & C. 339; 3 L. J. K. B. 32; 27 R. R. 375; and *Angus v. Dalton*, 1877, 3 Q. B. D. 93; 47 L. J. Q. B. 163, per Lush, J. And so Bracton says (lib. 4, cap. 37):

"Item pertinere poterunt (servitudes) sine constitutione per longum usum continuum et pacificum, et non interruptum per aliquod impedimentum contrarium, ex patientia inter præsentis, quæ trahitur ad consensum."

Mr. Gale here added a note that it was now generally thought that, in the absence of fraud, continuous possession alone should, in English as in Roman law, be held to constitute a valid title, without resort being had to the fiction of an agreement.

CHAPTER I.

OF THE ACQUISITION OF EASEMENTS UNDER THE EXPRESS WORDS OF AN INSTRUMENT.

A. OF THE CREATION OF EASEMENTS BY A STATUTE.

EASEMENTS can of course be created by a statute. A familiar instance is the creation of rights of way by Inclosure Acts or awards made thereunder (*a*).

B. OF THE ACQUISITION OF EASEMENTS UNDER INSTRUMENTS OTHER THAN A STATUTE.

SECT. 1.—*From whom and by whom Easements may be acquired.*

First, as to from whom an easement may be acquired.

With respect to the estate in the servient tenement which the grantor of the easement must possess at the date of the express grant, it has been held that an easement could not be granted by an executor who had no estate but only a power of sale (*b*), or by one who had only a right of entry under a building agreement (*c*), or by an owner in fee who had previously contracted to sell the servient tenement (*d*). And where at the time of the express grant of the easement the grantor had only a term of years in the servient tenement the grant did not bind the subsequently acquired fee (*e*).

From whom
easement
may be
acquired.

As regards statutory powers, it is settled that a limited owner has no power under the Lands Clauses Consolidation Act, 1845, to grant an easement (*f*).

Statutory
powers :
L. C. C. Act,
1845.

Sect. 3 of the Settled Land Act, 1882 (*g*), empowers a tenant for life to "sell the settled land, or any easement, right or privilege of any kind over or in relation to the same" (*h*). Under s. 6 of the same

Settled Land
Act, 1882.

(*a*) *Newcomen v. Coulson*, 1876, 5 Ch. D. 133; 46 L. J. Ch. 459; *Finch v. G. W. R.*, 1879, 5 Ex. D. 254; *Hulbert v. Dale*, 1909, 2 Ch. 570; 79 L. J. Ch. 48. See *Adeane v. Mortlock*, 1839, 5 Bing. N. C. 236; 8 L. J. C. P. 138; 50 R. R. 674.

(*b*) *Re Barrow-in-Furness and Rawlinson*, 1903, 1 Ch. 339; 72 L. J. Ch. 233.

(*c*) *Quicke v. Chapman*, 1903, 1 Ch. 659; 72 L. J. Ch. 373.

(*d*) *Beddington v. Atlee*, 1887, 35 Ch. D. 317; 56 L. J. Ch. 655.

(*e*) *Booth v. Alcock*, 1873, 8 Ch. 663; 42 L. J. Ch. 557. See further the rules as to the nature and construction of grants of easements, Chap. I., secs. 2 and 3, post.

(*f*) *Re Barrow-in-Furness and Rawlinson*, 1903, 1 Ch. 350.

(*g*) 45 & 46 Vict. c. 38.

(*h*) The words appear to authorize the creation de novo by way of sale of an easement over land remaining settled.—Challis, R.P., 3rd ed., 349, 356. As to the limits of this power, see *Sutherland v. S.*, 1893, 3 Ch. 169;

Act a tenant for life may grant a lease of "any easement, right or privilege of any kind over or in relation to" the settled land. By the last mentioned section a tenant for life may grant a wayleave for foreign minerals (*i*); and under a settlement of the surface of land, may grant a lease of a right to work mines so as to let down the surface, although, under the settlement, he had no power to work the minerals so as to let down the surface (*k*). In the case last referred to it was held that the fact that s. 7 (3) of the Act (which provides that every lease shall contain a condition of re-entry for non-payment of rent) cannot be complied with in the case of a lease of an incorporeal hereditament, does not prevent a tenant for life from granting such a lease. Where a lease of an easement is granted by a tenant for life under the Settled Land Acts, s. 7 of the Settled Land Act, 1882, provides that the best rent shall be reserved. According to the common law independently of statute, a rent could not be reserved by a subject of the Crown out of an easement (*l*). By statute, however, such a reservation might be made (*m*). It should be mentioned that payment of money in respect of an easement may be secured by covenant (*n*), and such a payment may sometimes be called rent (*o*).

Settled Land
Act, 1890.

By the Settled Land Act, 1890 (*p*), any easement, right or privilege of any kind may, on an exchange or partition (*q*) of settled land, be reserved or granted, or other land or an easement, right or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right or privilege of any kind. This provision authorizes an exchange of easements, apart from any exchange or partition of land (*r*).

A railway company cannot in general grant an easement over land required for the purposes of its undertaking (*s*), but may make such a grant where the easement is not inconsistent with these purposes (*t*).

62 L. J. Ch. 946; *Re Pearson's Will*, 1900, 83 L. T. 626; *Pease v. Courtney*, 1904, 2 Ch. 503; 73 L. J. Ch. 760.

(*i*) *Re Adam*, 1902, 2 Ch. 46; 71 L. J. Ch. 552.

(*k*) *Sitwell v. Londesborough*, 1905, 1 Ch. 460; 74 L. J. Ch. 254.

(*l*) *Buszard v. Capel*, 1828, 8 B. & C. 141; 6 L. J. K. B. 267; 32 R. R. 359, 361.

(*m*) *Re Gerard and Becham*, 1894, 3 Ch. 315; 63 L. J. Ch. 695.

(*n*) *Hastings v. N. E. R.*, 1898, 2 Ch. 674; 67 L. J. Ch. 590.

(*o*) *A.-G. v. Emerson*, 1891, A. C. 659; 61 L. J. Q. B. 79.

(*p*) 53 & 54 Vict. c. 69, s. 5.

(*q*) See Settled Land Act, 1882, s. 3 (iii.), (iv.); s. 17.

(*r*) *Re Bracken*, 1903, 1 Ch. 265; 72 L. J. Ch. 101. Cross sales of easements by the tenants for life of adjoining settled estates were held to be within their powers (*Re Brotherton, B. v. B.*, 1908, W. N. 56; 77 L. J. Ch. 58). The power to exchange releases of easements is doubtful (*ib.*, 1907, W. N. 230).

(*s*) *Mulliner v. Midland R. Co.*, 1879, 11 Ch. D. 611; 48 L. J. Ch. 258; see *G. W. R. v. Talbot*, 1902, 2 Ch. 765; 71 L. J. Ch. 835.

(*t*) *Re Gouty and Manchester Co.*,

Secondly, as to by whom an easement may be acquired.

By whom
easement
may be
acquired.

With respect to the estate in the dominant tenement which the grantee of the easement must possess at the date of the express grant, it seems that no easement can be granted to A., who at that date has no interest in the dominant tenement (*v*). But where at that date A. was yearly tenant of the dominant tenement, a grant (intended also to operate as a covenant) of an easement "to A., his heirs and assigns," enured for the benefit of the fee which A. subsequently acquired (*x*).

The question of the acquisition by a fluctuating class of customary rights in the nature of easements is dealt with, ante, pp. 4, 5.

As regards statutory powers.—No railway company or other public body having the powers of the Lands Clauses Consolidation Acts alone can purchase an easement (*y*). But in special cases rights in the nature of statutory easements can be acquired (*z*).

Statutory
powers.

SECT. 2.—Nature of the Instrument.

(a) Common Law.

Law and equity are now administered concurrently in all the Courts (*a*). But the distinction between legal and equitable rights is still material in certain cases; as in the case of a voluntary grant or agreement for a grant; or where a purchase for value without notice is pleaded (*b*). And it is convenient to treat these rights separately.

Distinction
between law
and equity.

Whatever doubts may formerly have existed as to the creation of easements by express agreement, it seems to be now fully settled that at common law, and apart from statute, easements can be created, so as to be legally appurtenant to property, only by an instrument under seal (*c*), or by will (*d*).

Express
creation of
easement can
only be by
deed or will.

1896, 2 Q. B. 439; 65 L. J. Q. B. 625; *S. E. R. v. Associated Portland*, 1910, 1 Ch. 25; 79 L. J. Ch. 150.

(*v*) *Rymer v. McIlroy*, 1897, 1 Ch. 532, 535; 66 L. J. Ch. 336; see *North British R. v. Park Yard*, 1898, A. C. 643 (a Scotch case).

(*x*) *Rymer v. McIlroy*, *sup.* See ante, p. 17.

(*y*) *Re Barrow-in-Furness and Rawlinson*, 1903, 1 Ch. 350; 72 L. J. Ch. 233; see *Pinchin v. London and Blackwall R. Co.*, 1854, 5 D. M. & G. 850; 24 L. J. Ch. 417; 104 R. R. 810.

(*z*) *Hill v. Midland R. Co.*, 1882, 21 Ch. D. 143; 51 L. J. Ch. 774; *G. W. R. v. Swindon Co.*, 1883, 22 Ch. D. 707; 1883, 9 App. Cas. 802; 52 L. J. Ch. 306; *Midland R. Co. v. G. W. R.*, 1909, A. C. 445; 42 L. J. Ch. 438.

(*a*) Jud. Act, 1873, ss. 24, 25.

(*b*) As to the distinction between legal and equitable rights to easements, see *Lecch v. Schweder*, 1874, 9 Ch. 475, 476; 43 L. J. Ch. 487; *Prinsep v. Belgravian*, 1896, W. N. 39.

(*c*) *Howlins v. Shippam*, post, p. 39. Under the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), a letting of an easement or other incorporeal hereditament can be effected without seal in Ireland. See *Radcliffe v. Hayes*, 1907, 1 I. R. 101. And in Scotland also an easement can be created by an instrument not under seal (*North British R. Co. v. Park Yard Co.*, 1898, A. C. 643; see *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403; 52 L. J. Q. B. 607).

(*d*) As to easements arising under

"And here," says Lord Coke (e), "is implied a division of fee or inheritance; viz., into corporeal, as lands and tenements, which lie in livery (f), comprehended in this word feoffment, and may pass by livery, by deed, or without deed; and incorporeal, which lie in grant, which cannot pass by livery, but by deed, as advowsons, commons, &c.; . . . and the deed of incorporeate inheritances doth equal the livery of corporeate. . . . Grant, *concessio*, is properly of things incorporeate, which, as hath been said, cannot pass without deed" (g).

Coparceners. The only exception to the general rule appears to be in the case of coparceners; for, as "land or other things that lie in livery may pass between them without deed, so also may incorporeal hereditaments which lie in grant" (h).

Common law decisions as to the effect of a licence. Nevertheless, questions of considerable difficulty and nicety have been raised as to the effect of a licence; and it was at one time contended "that a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing" (i). Upon a review of the authorities, however, this position cannot be considered as sound at common law. The utmost effect

Licence may work the extinction of an easement. in this respect of a licence is, that it may work the extinguishment of an existing easement. As, for instance, where a licence is given to a man to erect something on his own land which is incompatible with the continuance over it of some easement to which the licensor was entitled; so that the licence amounts to an abandonment of the easement.

Mere parol licence revocable. It should be remembered, in considering the cases on the point, that a mere parol licence, not coupled with a grant, is at common law revocable at any time by the licensor. But the licensee is not a trespasser until the licence is revoked; and he has a reasonable time after the withdrawal of the licence to go off the land and to remove goods which he has been licensed to place there (k).

The common law authorities as to the effect of a licence are stated in their chronological order in the following pages (37 to 60). The modern rules will be found post, pp. 62 to 64.

a will, see *Pheysey v. Vicary*, 1847, 16 M. & W. 484; 73 R. R. 583; *Pearson v. Spencer*, 1863, 3 B. & S. 761; *Barnes v. Loach*, 1879, 4 Q. B. D. 494; 48 L. J. Q. B. 756; *Phillips v. Low*, 1892, 1 Ch. 47; 61 L. J. Ch. 44; *Milner's Co. v. G. N. & City R.*, 1907, 1 Ch. 203; 76 L. J. Ch. 99.

(e) Co. Litt. 9 a.

(f) Corporeal hereditaments now lie in grant also: 8 & 9 Vict. c. 106.

(g) *R. v. Horndon-on-the-Hill*, 1816,

4 M. & S. 562; and *Hevelins v. Shippam and Cocker v. Cowper*, below.

(h) *Johnson v. Willson*, 1741, Willes, 253; Co. Litt. 169; 21 Edw. 3, 2.

(i) *Taylor v. Waters*, 1817, 7 Taunt. 384; 18 R. R. 499.

(k) *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334; 39 L. J. C. P. 202; *Mellor v. Watkins*, 1874, L. R. 9 Q. B. 400; *Wilson v. Tavener*, 1901, 1 Ch. 578; 70 L. J. Ch. 263.

In *Winter v. Brockwell* (1) the declaration stated that the plaintiff was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant, and that, by means of such open space, noisome smells from the defendant's house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a skylight above the plaintiff's ancient window, and covering the open space above mentioned, by means of which "the light and air were prevented entering the plaintiff's window and into his house, and noisome smells, arising from the adjoining house, were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue. It appeared in evidence that an open space which belonged to the defendant's house had been inclosed and covered by a skylight *with the express consent and approbation* of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall; some time after it was finished, the plaintiff objected to it, and gave notice to have it removed; but Lord Ellenborough was of opinion, that the licence given by the plaintiff to erect the skylight, having been acted upon by the defendant and the expense incurred, could not be recalled, and the defendant made a wrongdoer, at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And, under this direction, the defendant obtained a verdict.

It is to be observed, in this case, that the action was brought for the consequential injury only, and not for the trespass committed on the plaintiff's land by affixing the ironwork to his wall, as to which no point appears to have been made. The question arising on the Statute of Frauds, as to this being an interest in land, was, we are told in a note, "stated and overruled." The most important observation which suggests itself is on the statement of the injury in the declaration. The complaint appears to have been twofold: that is to say, the plaintiff complained that his easement—his passage of light and air to his ancient window—was obstructed, and also that he had been deprived of a distinct right, which every owner of property possesses without any prescription, and which can only be infringed upon by the acquisition of an easement on the part of his neighbour; viz., a right to enjoy his property without being subject to any private nuisances, such

Common
law decisions
as to licences.
Winter v.
Brockwell

(1) 1807, 8 East, 308; 9 R. R. 454.

Common law
decisions as to
licences.

as the noisome smells mentioned in this case. From the loose manner in which the case is reported, it is not easy to say whether the smells proceeded from the defendant's house or from the house of a third party; in *Hewlins v. Shippam* (m), the latter was considered to have been the case. Nor does it appear from the statement of facts in the report whether any such smells had actually been caused by the defendant, or whether, supposing any such smells to have been produced, evidence of a prescriptive right to make such a nuisance was adduced on the part of the defendant, the only injury alluded to in the judgment being the obstruction to the light and air. This case appears to have undergone very little consideration (n).

*Fentiman v.
Smith.*

Fentiman v. Smith (o) was an action brought for diverting a watercourse from the plaintiff's mill. The declaration stated the plaintiff's possession of a mill, and that by reason thereof he was entitled to the use and benefit of the water of a rivulet, which, until the interruption complained of, flowed through a tunnel into another stream, whereon the plaintiff's mill was built; but that defendant cut a channel, and thereby diverted the water from running into the said tunnel, and so to the mill. At the trial, it appeared that the tunnel was made in the defendant's land, and fixed into the ground with stone-work; that the defendant agreed for a guinea to let the plaintiff lay the tunnel, for the purpose of conveying the water to the mill; that defendant even assisted at the making of the tunnel, under the plaintiff's directions; but no conveyance was made of the land to the plaintiff; the guinea was afterwards tendered to the defendant, but he refused to receive it or to give his assent to the continuance of the tunnel, and made the obstruction complained of. A verdict having passed for the plaintiff, with leave to move to enter a nonsuit, in opposition to a rule obtained for this purpose, it was contended, "that it was sufficient for the plaintiff, against a wrongdoer, to declare upon his possession of the mill with the appurtenants"; but Lord Ellenborough said, "Such an allegation could not be sustained without showing that the *appurtenants* were *legally* such. Now here the title to have the water flowing in the tunnel over the defendant's land could not pass, by *parol licence without deed*, and the plaintiff could

(m) Post, p. 39.

(n) It is, however, recognized as law by Tindal, C.J., in *Liggins v. Inge*, cited post, in this chapter; and (as was pointed out by Alderson, B., in *Wood v. Leadbitter*) was decided on grounds inapplicable to cases as to the mode of

creating an easement. In *Darvies v. Marshall*, 1861, 10 C. B. N. S. 711; 31 L. J. C. P. 61; 128 R. R. 881, Williams, J., said that *Winter v. Brockwell* and *Liggins v. Inge* have not been in the least shaken by subsequent cases.

(o) 1803, 4 East, 107; 7 R. R. 533.

not be entitled to it, as stated in the declaration, by reason of his possession of the mill; but he had it by the licence of the defendant, or by contract with him; and if by licence it was revocable at any time. The enjoyment, with the defendant's assent, was not left as evidence to the jury to presume a grant, *but it was supposed that it gave a title in point of law, which it clearly did not.*" Common law decisions as to licences.

The principal authority in support of the position—that a parol licence, when executed, can pass an incorporeal hereditament—is the case of *Tayler v. Waters* (p); the effect of which is given in the judgment of Alderson, B., in *Wood v. Leadbitter*, stated below, p. 48. But the decision in *Tayler v. Waters* is directly at variance with numerous later decisions, and was overruled in *Wood v. Leadbitter* (q). *Tayler v. Waters.*

In *Heulins v. Shippam* (r), for a valuable consideration given by the plaintiff to the defendant, he assented to the plaintiff's making a drain at his own expense in his (the defendant's) land. The plaintiff made his drain at a considerable expense. In an action brought against the defendant for afterwards stopping up the drain, the plaintiff was nonsuited. In the judgment of the Court, delivered by Bayley, J., the following remarks occur: "A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise than by deed. *Termes de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription, without profit; and it instances, 'as a way or sink through his land, or such like.' In *Co. Litt.* 9 a, Lord Coke distinguishes between corporeal things which lie in livery and incorporeal which lie in grant, and cannot pass but by deed, as advowsons, commons, &c.; and it seems to be his opinion that (except in certain specified cases), where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from *Co. Litt.* 42 a. In *Co. Litt.* 169, the excepted case of parceners is mentioned: and there it is said that though" *Heulins v. Shippam.*

(p) 1817, 7 Taunt. 382; 18 R. R. 499.

Harris, 1859, 11 Ir. Ch. Rep. 38.

(q) 1845, 13 M. & W. 838; 14 L. J. Ex. 161; 67 R. R. 831; see *Malone v.*

(r) 1826, 5 B. & Cr. 221; 31 R. R. 757; 4 L. J. (O. S.) K. B. 241.

Common
law decisions
as to licences.

common of estovers or pasture, or a corody, or a way, lie in grant, they may, upon partition *between the parceners*, be *granted* without deed. So both Littleton and Lord Coke state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed ; and Lord Coke notices that rents, commons, advowsons, and the like, that lie in grant, though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed : Sheppard's Touchstone, 232 ; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed ; but Lord Coke, in Co. Litt. 85 a, makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it ; and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant (which I think there is not), it is not necessary to decide, because this is a case of a freehold, not of a chattel interest. Sheppard, in his Touchst. 231, lays it down that a licence or liberty (amongst other things) cannot be created or annexed to an estate of inheritance or freehold without deed. In 2 Rolle's Abr. 62, it is laid down that a thing lying merely in grant cannot pass without deed. In 9 Co. 9, it is said, *arguendo*, that tenant for life cannot *by word without deed* have the privilege of being dispunishable for waste ; and that position is adopted in Sheppard's Touchst. p. 231. In Gilbert's Law of Evidence, p. 96, 6th edition, this is laid down : ' If a man shows title to a thing lying in grant, *he fails if the seal be torn off from his deed* ; for a man cannot show a title to a thing lying in solemn agreement but by solemn agreement ; and there can be no solemn agreement without a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession but in agreement ; therefore a man cannot claim a title to a watercourse *but by deed, and under seal*.' *Bolton v. The Bishop of Carlisle* (s) is at variance with the position laid down by Lord Chief Baron Gilbert, that the party fails *if the seal be torn off the deed*. It was decided in that case that, if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case. In *Monk v. Butler* (t),

(s) 1793, 2 H. Bl. 259.

(t) 1620, Cro. Jac. 574.

where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from a commoner who had right for twenty beasts, it was objected that, if the commoner could license, he could not do so without deed; and of that opinion was the whole Court. In *Rumsey v. Rawson* (u) the objection to such a licence on the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue, was overruled, because the licence was only to take the profit unicâ vice, and because no estate passed by it. Yet in a subsequent case of *Hoskins v. Robins* (x) a similar objection was overruled, not on the ground that a parol licence would be sufficient, but on the ground that the objection to the mode of pleading the licence was waived by an issue on a collateral point, and that after verdict on such issue it must be taken that the licence was by deed; but, according to the report in Saunders, Hale, C.J., and the Court seemed to be of opinion that the licence could not be granted without deed. In *Harrison v. Parker* (y), where liberty and licence, power and authority, were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close to a close of Sir George Warren, and liberty and licence to plaintiff to lay the foundations of one end on Sir G.'s close, the grant was by deed. And in *Fentiman v. Smith* (z), where the plaintiff claimed to have passage for water by a tunnel over defendant's land, Lord Ellenborough lays it down distinctly: 'The title to have the water flowing in the tunnel over defendant's land could not pass by parol licence without deed.' Upon these authorities we are of opinion that, although a parol licence might be an excuse for a trespass till such licence were countermanded, yet a *right and title* to have passage for the water, for a freehold interest, required a deed to create it; and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported. The case of *Winter v. Brockwell* (a), which was relied upon on the part of the plaintiff, appears clearly distinguishable from the present. All that the defendant there did, he did *upon his own land*. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz., the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was that, as the plaintiff had consented to the

Common
law decisions
as to licences.

(u) 1681, 1 Vent. 18, 25.

(y) 1805, 6 East, 154; 8 R. R. 434.

(x) 1683, 1 Vent. 123, 163; 2 Saund.

(z) 1803, 4 East, 107; 7 R. R. 533.

327.

(a) 1807, 8 East, 309; 9 R. R. 454.

Common
law decisions
as to licences.

obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster* (b), *Wood v. Lake* (c), and *Tayler v. Waters* (d), were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore, cannot be considered as authorities upon the point; and on these grounds, therefore—that the right claimed by the declaration is a freehold right; and that, if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed—we are of opinion that the nonsuit was right.”

*Bryan v.
Whistler.*

In *Bryan v. Whistler* (e) the right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity.

*Bradley v.
Gill.*

In an old case, which does not appear to have been adverted to in more recent decisions, it was held that a parol licence could not confer an easement to carry on a noisy trade. In *Bradley v. Gill* (f) the plaintiff brought an action on the case for a nuisance occasioned by the recent erection of a smith's forge and shop so near to the plaintiff's house that the plaintiff and his family were disturbed by the noise of the defendant's business. The defendant pleaded that he had carried on the trade of a blacksmith for twenty years, and that the plaintiff advised him to come and live in the said house and carry on his trade there, by reason whereof he came to the said house and built there a convenient room to erect a smith's forge, traversing the erection of any other smith's shop. The opinion of the Court was that the action lay, and that the plea was no answer to the declaration, and that the traverse was idle; but the defendant, by consent, had liberty to amend his plea.

*Brown v.
Windsor.*

In *Brown v. Windsor* (g) the action was brought for withdrawing support from the plaintiff's house; the evidence of right to the

(b) 1620, Palm. 71; S. C., 2 Roll. & Ry. 318; 32 R. R. 389; 6 L. J. K. B. Rep. 152; Poph. 151.

(c) 1751, Sayer, 3.

(d) 1817, 7 Taunt. 374; 18 R. R. 499.

(e) 1828, 8 B. & C. 288; S. C., 2 Man.

(f) 1688, 1 Lutw. 69.

(g) 1830, 1 Cr. & J. 20.

support claimed consisted in proof of a parol permission on the part of the then owner of the defendant's property to the plaintiff to rest his building on a pine-end wall standing thereon ; under this permission the support had been enjoyed for twenty-six years. The plaintiff recovered ; and it was afterwards objected that there could not be, by law, such an easement as the right to support for a house in alieno solo ; but supposing that such an easement could be acquired, no objection whatever was made to the mode of its acquisition ; nor was any question raised as to whether an enjoyment, commencing under a licence, would confer an easement. The decision of the Court cannot, therefore, be considered as an authority upon this subject ; nor does it appear to have ever been treated as such in the later decisions of the Courts upon this point.

Common
law decisions
as to licences.

In *Liggins v. Inge* (h) it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill over the defendants' land, by a parol licence authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of the plaintiff's mill ; subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir ; and upon a refusal on the part of the defendants to do this an action was brought. In the judgment of Tindal, C.J., the following remarks occur :—

Liggins v.
Inge.

“ The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that the bank of the river which had been cut down was the soil of the defendants, and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, at their expense, in the year 1822, under a parol licence to them given for that purpose by the plaintiff's father, the then owner of the mill, and that, in the year 1827, the plaintiff's father represented to the defendants that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition, with which requisition the defendants had refused to comply.

(h) 1831, 7 Bing. 682 ; S. C., 5 M. & P. 712 ; 33 R. R. 615 ; 9 L. J. C. P. 202.

Common
law decisions
as to licences.

“The question, therefore, is whether such non-compliance, and the keeping of the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the defendants as to make them liable to this action.

“The argument on the part of the plaintiff has been that such parol licence is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol licence the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill, which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor, since the Statute of Frauds, as being ‘an interest in, to, or out of lands, tenements and hereditaments.’

“If it were necessary to hold that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the plaintiff's father to the defendants under the licence, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for it cannot be denied that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by a parol licence. But we think the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the licence, although such licence is countermanded, and, consequently, that they are not liable to an action as wrong-doers for persisting in such refusal.

“The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and lower the bank, and to erect the weir. Strictly speaking, if the licence was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of such licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol licence to be the transferring from the plaintiff's father to the

defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment on the part of the plaintiff's father that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition. . . .

Common
law decisions
as to licences.

" There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream should pull it down, and remove the works, with the intention never to return; could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose A. authorizes B., by express licence, to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light; could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence? Still further, this is not a licence to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like: which licence, if countermanded, the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is

Common
law decisions
as to licences.

attended with expense to the party using the licence; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a licence to do something that in its own nature seems intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such licence, after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. Indeed, the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect. Upon principle, therefore, we think the licence, in the present case, after it was executed, was not countermandable by the person who gave it; and, consequently, that the present action cannot be maintained."

*Cocker v.
Couper.*

In *Cocker v. Couper* (i) the doctrine laid down in *Hewlins v. Shippam* was fully recognized. In that case an action was brought for stopping up a watercourse. It appeared from the award of the arbitrator that the channel in question consisted of a drain and tunnel, which had been constructed in the defendant's land by the plaintiff, in the year 1815, with the verbal consent of the then tenant and of the defendant, and that the water had flowed through it up to the year 1833, when, upon the plaintiff's refusal to pay for the use of the water, the defendant diverted the channel. The Court of Exchequer were clearly of opinion that the plaintiff was not entitled to recover. "With regard to the question of licence," said the Court, "the case of *Hewlins v. Shippam* is decisive to show that an easement like this cannot be conferred unless by deed" (k).

*Wallis v.
Harrison.*

In *Wallis v. Harrison* (l) an action was brought by the reversioner for digging up the soil and making embankments and a railway over land in the occupation of his tenant. The defendants, among other pleas, pleaded, "that before the close in which, &c., became the plaintiff's property, the Dean and Chapter of Durham, being seised in fee of the said close, agreed with the defendants that they should have licence, liberty, power and authority to enter upon the said close, and to form, make and maintain certain roads, &c.: and that the said dean and chapter should ratify and confirm the same to the defendants: and that before the plaintiff had any interest in the said close, the said dean and chapter gave and

(i) 1834, 1 C. M. & R. 418; 40 R. R. 626.

K. B. 302.

(k) See also *Bryan v. Whistler*, 1828, 8 B. & C. 288; 32 R. R. 389; 6 L. J.

(l) 1838, 4 M. & W. 538; 8 L. J. Ex. 44; 51 R. R. 715.

delivered to the defendants, at their request, possession of the said way-leave, &c., over which the said roads now are, and at the same time when, &c., had been constructed, with leave, licence, authority and power to the defendants to enter and set out the same; whereupon, before, &c., they entered and set out the same": the plea then alleged an indenture by which the dean and chapter granted and demised, and granted, ratified and confirmed, unto the defendants such full liberty, &c., and averred that the defendants, by virtue of such leave, &c., and such indenture, had made the road, and unavoidably committed the said trespasses. To this plea the plaintiff demurred on the ground that the right of making the road was a matter which lay in grant, and could only be conferred by deed and not by parol, and the deed mentioned in the plea, as it appeared on over, did not amount to a confirmation of any prior licence by deed. The Court held the plea to be bad, as such a licence might be countermanded at any time by the owner of the land who granted it, and at all events could not be binding on his transferee.

Common
law decisions
as to licences.

Lord Abinger, C.B., said, in delivering judgment: "Then, treating it as a plea of licence, I think it is bad on general demurrer, because a mere parol licence to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said that the defendant should have had notice of the transfer. This is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *primâ facie*, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true it would be the assertion of a negative. But I think this would be one of those cases where, to make a title or excuse good, a negative should be shown on the pleadings, even if the proof of the affirmative might be on the opposite party. As to the case of *Webb v. Paternoster*, the grant of the licence to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied, and that might be granted by parol." And Parke, B., added: "Then with regard to the licence, the plea is bad in substance. We are not called upon in this case to consider, whether a licence to create or make a railroad, granted by a former owner of

Common
law decisions
as to licences.

the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter v. Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the licence, and therefore it remains executory; and I take it to be clear, that a parol executory licence is countermandable at any time; and if the owner of land grants to another a licence to go over or do any act upon his close, and then conveys away that close, there is an end to the licence; for it is an authority only with respect to the soil of the grantor; and if the close ceases to be his soil, the authority is instantly gone. *Webb v. Paternoster* is very distinguishable from this case, for there the licence was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest against the licensor and his assigns; but a licence executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his and the licence is uncountermanded, but ceases the moment the property passes to another" (m).

Wood v.
Leadbitter.

Subsequently the authorities on the subject were reviewed in *Wood v. Leadbitter* (n). "This was an action," said Alderson, B., in delivering the judgment of the Court, "for an assault and false imprisonment. The plea (on which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by the *leave and licence of Lord Eglintoun*. The leave and licence was traversed by the defendant, and

(m) See *Roffey v. Henderson*, 1851, 17 Q. B. 574; 85 R. R. 571; 21 L. J. Q. B. 49, where the plaintiff claimed a right to enter a house in the possession of the defendant for the purpose of removing fixtures, under a licence given for that purpose by the lessor, who demised the house to the defendant subsequently to the giving of the licence; and *Coleman v. Foster*, 1856, 1 H. & N. 37; 108 R. R. 442, in which a licence to enter a playhouse was set up against a subsequent lessee of the playhouse: the attempts in both cases were unsuccessful.

(n) 1845, 13 M. & W. 838; 67 R. R. 831; 14 L. J. Ex. 161; see also *Bird v. Higginson*, 1837, 6 A. & E. 824; 6 L. J. Ex. 282. With respect to the decision in *Wood v. Leadbitter* (see post, p. 63) it has been recently said in the Court of Appeal that since the Judicature Act,

1873, under which the rules of equity prevail, this decision cannot be applied in its integrity by a Court bound to give effect to equitable considerations: *Hurst v. Picture Theatres*, 1915, 1 K. B. 9; 83 L. J. K. B. 1837; see also *Lowe v. Adams*, 1901, 2 Ch. 600; 70 L. J. Ch. 783. For a long period, however, *Wood v. Leadbitter* was treated as a leading authority on this branch of law. Before the Judicature Act it was on several occasions approved, and since that Act it has been on several occasions discussed. See the dissenting judgment of Phillimore, L.J., in *Hurst v. Picture Theatres*, 1915, 1 K. B. 16, 17; 83 L. J. K. B. 1837. Under these circumstances the following statement of the judgment of Alderson, B., which occurred in previous editions of this treatise, has been retained.

issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to land surrounding the great stand on the Doncaster racecourse; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand, and the inclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

Common
law decisions
as to licences.

“ My brother Rolfe, in directing the jury, told them, that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure, and that, if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question *by the leave and licence of Lord Eglintoun*. On this direction the jury found a verdict for the defendant. In last Michaelmas Term Mr. Jervis obtained a rule nisi to set aside the verdict for misdirection, on the ground that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the inclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the inclosure by the leave and licence of Lord Eglintoun. Cause was shown during last term, and the question was argued

Common
law decisions
as to licences.

before my brothers Parke and Rolfe, and myself ; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

“ That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite. And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter : a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple.

“ Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun ; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land,—it is a right of way and something more : and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends that, without any grant from Lord Eglintoun, he had licence from him to be in the close in question at the time when he was turned out, and that such licence was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz., *Webb v. Paternoster*, reported in five different books, namely, Palmer, 71 ; Roll. 143, 152 ; Noy, 98 ; Popham, 151 ; and Godbolt, 282 ; *Wood v. Lake (o)*, *Taylor v. Waters (p)*, and *Wood v. Manley (q)*.

“ As the argument of the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them

(o) 1751, Sayer, 3.

(p) 1817, 7 Taunt. 374 ; 18 R. R. 499.

(q) 1839, 11 A. & E. 30 ; 3 Per. & D.

5; 9 L. J. (N. S.) Q. B. 27 ; 52 R. R.

271.

minutely, in order to see the exact points which they severally decided. Common law decisions as to licences.

“ Before, however, we proceed to this investigation, it may be convenient to consider the nature of a licence, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C. J. Vaughan’s elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his Reports. The question there was as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners’ Company to do certain acts notwithstanding those statutes.

“ In the course of his judgment the Chief Justice says (r), ‘ A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man’s park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man’s park, and carry away the deer killed to his own use ; to cut down a tree in a man’s ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licences ; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or licence may destroy and alter property.’

“ Now, attending to this passage, in conjunction with the title ‘ Licence,’ in Brooke’s Abridgment, from which, and particularly from paragraph 15, it appears that a licence is in its nature revocable, we have before us the whole principle of the law on this subject. A mere licence is revocable : but that which is called a licence is often something more than a licence ; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

“ It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol ; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a

(r) Vaughan, 351. See the judgment of Romer, L.J., *Warr v. London County Council*, 1904, 1 K. B. 721 ; 73 L. J. K. B. 362.

Common
law decisions
as to licences.

nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence ; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a licence by A. to hunt in his park, whether given by deed or by parol, is revocable ; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice Vaughan, a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land : and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it : he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse ; and, if it did, then the licence would be irrevocable.

“ Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. Jervis for the plaintiff. The first was *Webb v. Paternoster*. That, as appears from the report in Rolle, was an action of trespass, brought against the defendant for eating, by the mouths of his cattle, the plaintiff’s hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir W. Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir W. Plummer had licensed him to place the hay on the close till he could conveniently sell it, and that before he could conveniently sell it, Sir W. Plummer leased the land to the defendant. The defendant demurred to the replication.

“ From the arguments, as given in Rolle, it appears that the plaintiff’s counsel, who was first heard, contended, first, that the licence, being a licence for profit and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable : and, secondly, even if the licence was revocable, still that the lease to the defendant was an implied, and not an

express revocation, and therefore was inoperative against him without notice ; and for this he referred to *Mallory's Case* (s). To this latter proposition the Court appears to have assented ; but Dodderidge, J., suggested, that, even if the licence was in force, still the licensor did not by such a licence preclude himself, nor, consequently, his tenant, from turning cattle on the land, and that the *licensee* ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged that it appeared by the record, that the plaintiff had had two years to sell his hay before the defendant's cattle had eaten it ; and he argued that the Court would say, as matter of law, that this was more than reasonable time ; and to this the Court assented. The plaintiff's counsel, in reply, reverted to the distinction between the licence for profit and a licence for pleasure ; but Dodderidge, J., denied it, and said that a licence to dig gravel, though a licence for profit, is revocable ; and he said that the true distinction was between a *mere* licence, and a licence *coupled with an interest*. Judgment was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay.

Common
law decisions
as to licences.

“ It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the Court, and not for the jury ; and, secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited ; and the only support which the case affords to the doctrine contended for by the present plaintiff is what is said, in the report of the case in Popham, to have been agreed by the Court, namely, that a licence for profit for a term certain is not revocable ; a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain that the licence in *Webb v. Paternoster* was not a licence under seal. The defendant's counsel appears, from the report in Rolle, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c. ; a form of expression not very appropriate, if used in respect of a party who had a mere parol licence ; and the Chief Justice, according to the report in Popham and Palmer, says that the plaintiff had an interest which charged the land, into whose hands soever it should come. And Dodderidge, J., according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths,

Common
law decisions
as to licences.

says it was folly of the plaintiff that he did not, *together with the licence, take a covenant that it should be lawful for him to fence the hay with a hedge*. From these expressions (and there are others in the various reports of the case having a similar aspect), it certainly seems possible that the licence was under seal; and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the licence to have been a mere parol licence, yet the strong probability is that Webb had purchased the hay from Sir W. Plummer as a growing crop, with liberty to stack it on the land, and then the parol licence might be good as a licence coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the case before us; and the judgment of Dodderidge, J., as given both in Rolle and Palmer, is in strict accordance with what was afterwards laid down by Vaughan, C.J., and which we consider to be consonant both to principle and authority.

"The next decision in order of time is that of *Wood v. Lake*, in Sayer, p. 3. There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years. After the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in Sayer of the arguments at the bar. But from a MS. report of the same case, referred to by Gibbs, C.J., in the case of *Taylor v. Waters*, and which MS. we have had an opportunity of consulting, through the kindness of the representatives of the late Mr. Justice Burrough (t), it appears that the argument turned

(t) The following is a copy of the report in the MS. volume of Justice Burrough:—

"CASE.—A parol agreement that the plaintiff should have liberty of laying and stacking of coals upon defendant's close, for seven years. Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but tenant at will. Quære, if this was an interest within the description of the Statute of Frauds.

"Serjeant Booth.—This is but a personal licence or easement: 1 Roll. Abr. 859, p. 4; Roll. Rep. 143, 152; 1 Saund. 321. A contract for sale of timber growing upon the land has been determined to be out of the statute: 1 Ld. Raym. 182. Vide the difference of a

licence and a lease, 1 Lev. 194. This must be taken only as a licence, for that the coal-loaders also are to have benefit, as well as plaintiff.

"Serjeant Poole, for defendant.—Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the statute, ergo void, being for longer term than three years: Bro. Licence, p. 19; *Thome v. Seabright*, Salk. 24; *Webb v. Paternoster*, Poph. 151. A licence to enter upon and occupy land amounts to a lease. The plaintiff not confined to a particular part of the close, and might have covered the whole if he pleased; on that account it is an uncertain interest. The distinction of licence to plaintiff and his coal-loader is nothing; he could not stack the coal himself, and it is merely vague.

wholly on the point whether the privilege of stacking the coal did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. Lee, C.J., and Denison, J., held it to be no lease, nor uncertain interest in land; but Foster, J., doubted, and desired time to consider. On the last day of term, the Court gave judgment for the plaintiff, Foster non dissentiente.

Common
law decisions
as to licences.

“Supposing the Court to have been right in deciding that this was not a lease (which, however, is doubted by Sir E. Sugden, see 1 V. & P., last edit. p. 139), yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the Court proceeded on the ground that the plaintiff had acquired the easement by the parol licence, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the action is stated to have been *an action on the case*, it may have been a mere *assumpsit*—an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the contract was not (and probably the Court considered it was not) a contract concerning land, within the 4th section of the Statute of Frauds (*u*).

“The next case on which the plaintiff relies is *Taylor v. Waters*, reported in 7 Taunt. 374 [18 R. R. 499]. It was an action by the plaintiff against the door-keeper of the Opera-house, for preventing him from entering the house during the performance of an opera. It appeared that one W. Tayler, being in possession of the Opera-

Easement may be of more value than the inheritance; ex. gr., way-leave.

“Lee, C.J.—If this be a lease, as it is argued, it is within the statute, and void, for not being in writing. No answer as yet is given to the case in Popham, when the stacking of hay, which is similar, was determined to be a licence. The word *uncertain*, in the statute, means uncertainty of duration, not of quantity. Licence was not revocable, and here is no case to show this to be considered as a lease.

“Denison, J.—This seems not to be an interest, so called in the language of the law, although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licenses to enjoy

lands for five years, there is a lease, because the whole interest passes, but this was only a licence for a particular purpose.

“Foster, J. — These interests, grounded upon licences, are valuable, and deserve the protection of the law, and therefore may perhaps have been within the intention of the words of the statute.—Desired further time for consideration: stood over.”

N.B.—Afterwards, upon motion for judgment the last day of term, the Court gave judgment for plaintiff, Foster non dissentiente.

(*u*) See *Jones v. Flint*, 1839, 10 A. & E. 753; 50 R. R. 527; 9 L. J. (N. S.) Q. B. 252; *Wright v. Stavert*, 1860, 2 E. & E. 721; 29 L. J. Q. B. 161; 119 R. R. 930.

Common
law decisions
as to licences.

house, as lessee for a long term of years, by a deed, dated the 24th of August, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Tayler continued in possession by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he by deed, granted to one Gourgass, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgass to the plaintiff in July, 1799, but no deed of assignment to him was executed. In 1800, Tayler's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before C. J. Gibbs, and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were, that the right under the silver ticket was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and, *consequently*, might be granted without a deed.

“The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster*, which, he said, showed that a beneficial licence, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point all doubt, if there remained any, had (he said) been removed by the case of *Wood v. Lake*.

“This judgment is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the Court was not called in the argument to the principles and earlier authorities, to which we have adverted. Brooke, in his Abridgment, Dodderidge, in the case of *Webb v. Paternoster*, and Lord Ellenborough, in the case of *Rex v. Horndon-on-the-Hill* (x), all state in the most distinct manner that every licence is and must be in its nature revocable, so long as it is a mere licence. Where, indeed, it is connected with a grant, there it

(x) 1816, 4 M. & Sel. 562.

may, by ceasing to be a naked licence, become irrevocable : but then it is obvious that the grant must exist independently of the licence, unless it be a grant capable of being made by parol, or by the instrument giving the licence. Now in *Tayler v. Waters* there was no grant of any right at all, unless such right was conferred by the licence itself. C. J. Gibbs gives no reason for saying that the licence was a licence irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the Court. Again, the Chief Justice is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds, showed it to be grantable without deed, we cannot discover. The precise point decided in *Webb v. Paternoster* is not adverted to, and it is assumed, without discussion, that the licence there must have been a parol licence, and a naked licence, unconnected with an interest capable of being created by parol. This action was not, as it may have been in *Wood v. Lake*, an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had vested in the plaintiff, under the licence conferred by the silver ticket. With all deference to the high authority from which the judgment in *Tayler v. Waters* proceeded, we feel warranted in saying that it is to the last degree unsatisfactory :—an observation which we have the less hesitation in making, in consequence of its soundness having obviously been doubted by the Court of King's Bench and Mr. Justice Bayley, in the case of *Hevins v. Shippam*.

“ The fourth and last case relied on by Mr. Jervis was the recent case of *Wood v. Manley*, in the Queen's Bench (y). That was an action for trespass *quare clausum fregit* ; plea, that defendant was possessed of a large quantity of hay being on the plaintiff's close, and that by leave of plaintiff he entered on the close in question to remove it. Replication, *de injuriâ*. It was proved at the trial that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were that the purchaser of the hay might leave it on the close until Lady-day, and might in the meantime come on to the close from time to time, as often as he should see fit, to remove it.

Common
law decisions
as to licences.

(y) 1839, 11 A. & E. 30 ; 9 L. J. Q. B. 27 ; 52 R. R. 271.

Common
law decisions
as to licences.

These conditions were assented to by the plaintiff. The defendant became the purchaser, and afterwards, and before Lady-day, the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, Erskine, J., telling the jury that the licence to come from time to time to remove the hay was irrevocable. Mr. Crowder moved to set aside this verdict, on the ground that the licence was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and, we think, quite rightly. This was a case, not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it became, as in the case of the tree and the deer, put by C. J. Vaughan, irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them: *Vin. Abr. Trespass, (H) a 2, pl. 12*: and *Patrick v. Colerick (z)*.

“It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Tayler v. Waters*, in which the real difficulty was not discussed, nor even stated. It was taken for granted that, if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision on an occasion where we were called on to lose sight of the ancient landmarks of the common law.

“We are not, however, driven to say that we shall not disregard that case *merely* on principle. Giving it the full weight of judicial decision, it is met by several others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the cases of *Fentiman v. Smith (a)* and *Rex v. Horndon-on-the-Hill (b)*, which were before *Tayler v. Waters*, Lord Ellenborough and the Court of King's Bench expressly recognized the doctrine that a licence is no grant, and that it is in its nature necessarily revocable, and the further doctrine that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgment of the Court of King's Bench, given by Bayley, J., in *Hewlins v.*

(z) 1838, 3 M. & W. 483; 49 R. R. 696; 7 L. J. (N. S.) Ex. 135.

(a) 1803, 4 East, 107; 7 R. R. 533.
(b) 1816, 4 M. & Sel. 565.

Shippam (c), the necessity of a deed, for creating any incorporeal right affecting land, was expressly recognized and formed the ground of the decision. It is true that the interest in question in that case was a freehold interest, and on that ground Bayley, J., suggests that it might be distinguished from *Taylor v. Waters*; but in an earlier part of that same judgment, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Taylor v. Waters* to be law. The doctrine of *Hewlins v. Shippam* has since been recognized and acted upon in *Bryan v. Whistler* (d), *Cocker v. Cowper* (e), and *Wallis v. Harrison* (f), and it would be impossible for us to adopt the plaintiff's view of the law, without holding all those cases to have been ill decided. It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say that in several of the cases we have cited, (*Hewlins v. Shippam*, for instance, and *Bryan v. Whistler*,) the alleged licence had been granted for a valuable consideration, but that was held not to make any difference. We do not advert to the cases of *Winter v. Brockwell* (g), and *Liggins v. Inge* (h), or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were in fact admitted not to bear upon it.

“In conclusion, we have only to say, that, acting upon the doctrine relative to licences, as we find it laid down by Brooke, by Mr. Justice Dodderidge, and by C. J. Vaughan, and sanctioned by *Hewlins v. Shippam*, and the other modern cases proceeding on the

Common
law decisions
as to licences.

(c) 1826, 5 B. & C. 222; 31 R. R. 757; 4 L. J. (O. S.) K. B. 241.

(d) 1828, 8 B. & C. 288; 32 R. R. 389; 6 L. J. K. B. 302.

(e) 1834, 1 C. M. & R. 418; 40 R. R. 626.

(f) 1838, 4 M. & W. 538; 8 L. J. Ex. 44; 51 R. R. 715.

(g) 1807, 8 East, 308; 9 R. R. 454.

(h) 1831, 7 Bing. 682; 33 R. R. 615; 9 L. J. (O. S.) C. P. 202.

Common
law decisions
as to licences.

*Perry v.
Fitzhove.*

same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and that this rule must be discharged.—Rule discharged ” (i).

In *Perry v. Fitzhove* (k) A., having a right of common, appurtenant to Blackacre, over land called the Heath, gave B. a parol permission to build a house on the Heath. B. built in pursuance of the licence. Blackacre afterwards came by assignment to C., who pulled down the building; and upon an action of trespass being brought by B., C. pleaded, inter alia, a justification under an immemorial right of common appurtenant to Blackacre, over the Heath. The Court held that to that plea it was a bad replication that A. had given the licence, and that B. had built the house under that licence; on the ground that the plaintiff was setting up a grant of a freehold interest, binding the inheritance of Blackacre by restricting the right of common appurtenant to it, and that such grant must be by deed under seal. It was argued that the case fell within the principle of the authorities, as to the effect of a parol licence executed in extinguishing an easement; so that the right of common might be considered to be extinguished in the spot on which the building was erected. The judgment does not advert to the distinction between the effect of a licence operating, when acted upon, by way of extinguishment of an existing right, and one operating by way of grant of a right to interfere with that right, supposing it not to be extinguished; for it is laid down by the Court that the licence could only operate, if at all, in the last-mentioned way, which it clearly could not do. And, having regard to this, and also to the peculiar nature of a right of common appurtenant by prescription (which is in its nature entire (l), and an extinguishment of which by act of its owner in any part of the land over which it is claimed works

(i) Cf. *Adams v. Andrews*, 1850, 15 Q. B. 284; 20 L. J. Q. B. 33; *Taplin v. Florence*, 1851, 10 C. B. 744; 84 R. R. 773; 20 L. J. C. P. 137. In *Bell v. Midland R. Co.*, 1859, 3 De G. & J. 673; 30 L. J. C. P. 273; 121 R. R. 284, it was attempted to apply *Wood v. Leadbitter* to a case where, an Act of Parliament having authorized the owners of lands adjoining a railway to construct branch railways or sidings so as to form continuous communication from their own lands to the railway, with a provision for the settlement by justices of any dispute as to the proper place for the sidings, the plaintiff had constructed and used a siding at a particular spot with the assent of the company, which they afterwards attempted to revoke. The company relied upon

Wood v. Leadbitter, but without success, the Court holding that those authorities have no bearing upon such a case. Nor do they apply to the ordinary contract entered into by a railway company for the carriage of a passenger (*Butler v. Manchester R. Co.*, 1883, 21 Q. B. D. 207; 57 L. J. Q. B. 564). Nor can they be set up by a mere wrongdoer, against the possessory right of a licensee (*Northam v. Hurley*, 1853, 1 E. & B. 665; 22 L. J. Q. B. 183; 93 R. R. 329).

(k) 1846, 8 Q. B. 757; 70 R. R. 626; 15 L. J. Q. B. 239.

(l) See the distinction in this respect between a right acquired under Lord Tenterden's Act and by prescription at the common law explained in *Davies v. Williams*, 1851, 16 Q. B. 546; 20 L. J. Q. B. 330; 83 R. R. 592.

at common law (*m*) an extinguishment of it over the whole), and further to the fact that it did not appear that the licensee had any interest in the land upon which he was licensed to build, the judgment cannot be said to be opposed to the above authorities, as to the binding effect of a licence given by the owner of a dominant tenement to the owner of the servient, to erect some permanent structure on his land, inconsistent with the continuance of the easement. It is difficult, however, to reconcile the opinion expressed by the Court, that such cases as *Winter v. Brockwell* only apply as between the original licensor and the licensee, and would not bind an assignee of the former, with the interpretation of that case in the authorities already cited in this chapter, and those which will be found collected post, Part V., Chap. 2.

Common law decisions as to licences.

There is nothing in the cases cited to prevent a court of law from giving damages for a breach of a written agreement to grant a licence irrevocable for a definite period (*n*). And a licensee whose licence is revoked is entitled to reasonable notice of the revocation (*o*).

Damages.

Revocation.

The result of the common law authorities above referred to (p. 37 to p. 60) was thus in effect stated by Mr. Gale: "A man may in some cases by parol licence relinquish a right which he has acquired in addition to the ordinary rights of property and thus restore his own and his neighbour's property to their original and natural condition. But he cannot by such means impose any burden on land in derogation of such ordinary rights of property." Thus a parol licence given by B., the owner of land (the servient tenement), to A., the owner of a neighbouring house (the dominant tenement), to turn a spout of water from the house on to the land, will be revocable. On the other hand, supposing in such a case the house to contain ancient windows, a parol licence given by A. to B. to build a wall on B.'s land in front of A.'s ancient windows will be irrevocable. In the last-mentioned case, however, it would seem that, in order that a parol licence should so operate, the act licensed should be executed and the necessary consequence of such execution should be per se the extinguishment of the right to light. For the cases do not appear to furnish any authority for saying that where the extinguishment of an easement would depend

Result of common law decisions as to effect of licence stated by Mr. Gale.

(*m*) Co. Litt. 122 a; 4 Rep. 38 a; Cruise, Dig. title XXIII., Common, §§ 43, 82.

(*n*) *Smart v. Jones*, 1864, 33 L. J. (N. S.) C. P. 154; cf. *Somerset v. Fogwell*, 1826, 5 B. & C. 875; 29 R. R. 449; 5 L. J. K. B. 49; *Kerrison v. Smith*, 1897, 2 Q. B. 445; 66 L. J. Q. B. 762.

(*o*) *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 335; 39 L. J. C. P. 20; *Mellor v. Watkins*, 1874, L. R. 9 Q. B. 400; *Aldin v. Latimer Clark, Muirhead & Co.*, 1894, 2 Ch. 437; 63 L. J. Ch. 601; *Wilson v. Tavener*, 1901, 1 Ch. 578; 70 L. J. Ch. 263; cf. *Lowe v. Adams*, 1901, 2 Ch. 598; 90 L. J. Ch. 783; dist. *Lemmon v. Webb*, 1895, A. C. 1; 64 L. J. Ch. 205.

upon a repetition of the licensed acts, a parol licence would be sufficient to effect it. Indeed, where the acts from their nature lie in repetition such licence could not be executed.

Concordance
of the civil
law.

This doctrine, that an easement may be extinguished by an executed authority to a man to do an act on his own land the necessary consequence of which will be such extinguishment, coincides with the provision of the civil law (*p*).

Rules before
Judicature
Acts as to
licences and
creation of
easements
and profits.

The rules which before the Judicature Acts prevailed at common law in relation to the creation of easements, profits à prendre, and as to licences appear to be as follows:—

At common law an easement could not be created except by deed (*q*), or will (*r*), or statute (*s*). A deed was also necessary for the creation of a profit à prendre (*t*).

As regards licences.—A licence to enter on land coupled with a legal interest conferred on the licensee was irrevocable, whether it was under seal or not (*u*). A mere licence not so coupled was revocable, whether it was under seal or not (*x*). Even where the licence had been executed and expense incurred by the licensee, a parol licence to do an act on the land of the licensor was at common law revocable (*y*). As regards, however, a licence to do acts on the land of the licensee, a parol licence for such acts which involved expenditure by the licensee was at common law irrevocable where the work had been executed (*z*).

As an illustration of the distinction between a licence coupled with a grant which was irrevocable and a licence not so coupled

(*p*) Si stillicidii immittendi jus habema in arcam tuam, et permisero jus tibi in eâ areâ ædificandi, stillicidii immittendi jus amitto; et similiter si per tuum fundum via mihi debeatur, et permisero tibi in eo loco per quem via mihi debetur, aliquid facere, amitto jus viæ. —Dig. 8, 6, 8, Quem serv. amit.

(*q*) *Wood v. Leadbitter*, 1845, 13 M. & W. 843; 14 L. J. Ex. 161; see ante, p. 35.

(*r*) *Pearson v. Spencer*, 1863, 3 B. & S. 761.

(*s*) *L. & N. W. R. v. Evans*, 1893, 1 Ch. 16; 62 L. J. Ch. 1, where a right of support was held to have been created by statute.

(*t*) *Wood v. Leadbitter*, ubi sup.; *Bird v. Higginson*, 1835, 2 A. & E. 696; 6 A. & E. 824; 6 L. J. Ex. 282 (right of sporting); *Somerset v. Fogwell*, 1826, 5 B. & C. 875; 5 L. J. K. B. 49; 29 R. R. 449 (right of fishing).

(*u*) *Jones v. Tankerville*, 1909, 2 Ch. 442; 78 L. J. Ch. 674; *Wood v.*

Leadbitter, 1845, 13 M. & W. 845; 14 L. J. Ex. 161; 67 R. R. 831; *Doe v. Wood*, 1819, 2 B. & Ald. 738; 21 R. R. 469.

(*x*) *Wood v. Leadbitter*, 13 M. & W. 845. See *Smith v. Colbourne*, 1914, 2 Ch. 533; 84 L. J. Ch. 611, where an agreement relating to the light of a building which empowered an adjoining owner to enter and block up windows was held to be a revocable licence not binding on the purchaser of the building.

(*y*) *R. v. Horndon-on-the-Hill*, 1816, 4 M. & S. 562; *Fentiman v. Smith*, 1803, 4 East, 107; 7 R. R. 533; *Cocker v. Cowper*, 1834, 1 C. M. & R. 418; 40 R. R. 626; *Bryan v. Whistler*, 1828, 8 B. & C. 288; 6 L. J. K. B. 302; 33 R. R. 389.

(*z*) *Plummer v. Wellington*, 1884, 9 App. Cas. 714; 53 L. J. P. C. 104; *Winter v. Brockwell*, 1807, 8 East, 308; 9 R. R. 454; *Liggins v. Inge*, 1831, 7 Bing. 682; 9 L. J. C. P. 202; 33 R. R. 615; *Coryton v. Lithby*, 2 Williams' Saunders, 364 (notes).

which was revocable, reference should be made to *Warr v. London C. C.*, 1904, 1 K. B. 722, where Romer, L.J., says that Vaughan, C.J., in *Thomas v. Sorrell*, 1674, Vaughan, 351 (see ante, p. 51), points out that where there is, in addition to a mere licence to go on land, leave to take something out of the land (as, for instance, where there is a licence to hunt in a man's park and carry away the deer killed or to cut down a tree in a man's ground and carry it away), there is as regards the going on the land to hunt or to cut down the tree a mere licence, but as regards the carrying away of the deer killed or the tree cut down there is a grant.

By the Judicature Act, 1873, s. 25, sub-s. 11, it was provided that where there was any variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity should prevail. In dealing, accordingly, with any questions which since the Judicature Acts fall to be decided in relation to the above matters, regard must be had to the decisions in equity which are stated post (a). In particular, as regards the decision of the Court of Exchequer in *Wood v. Leadbitter* (in which some of the above rules were discussed and stated), it has been recently held by the Court of Appeal in *Hurst v. Picture Theatres* (b) that the decision referred to is not one which can be applied in its integrity by a Court bound to give effect to equitable considerations.

Since Judicature Acts.

This decision of the Court of Appeal appears to have carried somewhat further the doctrines which before the Judicature Acts were adopted by courts of equity on these questions. Thus, in *Frogley v. Lovelace* (c), decided before the Judicature Acts, a Court of Equity held in effect that a licence coupled with a contractual right conferred on the licensee and relating to an interest in land (sporting rights) ought to be treated as irrevocable, and that the rights under it should be protected by injunction accordingly. In *Hurst v. Picture Theatres* (d), decided since the Judicature Acts, the Court of Appeal held in effect that a licence for value to enter on land, but not otherwise conferring on the licensee any contractual right to an interest in land, ought to be treated as irrevocable.

(b) *Equity.*

We have seen that at common law a deed was in all cases necessary

Decisions in equity as to the creation of easements.

(a) See post, pp. 64 et seq.

(b) 1915, 1 K. B. 1; 83 L. J. K. B. 1837.

(c) 1859, John. 333; 123 R. R. 147. See the judgment of Parker, J., in *Jones v. Tankerville*, 1909, 2 Ch. 442, 443; 78 L. J. Ch. 674.

(d) *Ubi sup.*; see the dissenting

judgment of Phillimore, L.J., 1915, 1 K. B. 17, 18; 83 L. J. K. B. 1837. And compare the judgment of Buckley, L.J., 1915, 1 K. B. 7, with the distinction drawn by Vaughan, C.J., in *Thomas v. Sorrell* as mentioned above; and with the judgment of Alderson, B., in *Wood v. Leadbitter*, ante, p. 57.

Decisions in equity as to the creation of easements.

for the creation of an easement (ante, p. 35). The rule in equity, however, was different, and this now prevails (e). According to this rule, if there is an agreement (whether under seal or not) to grant an easement for valuable consideration, equity considers it (as between the parties to the agreement and persons taking with notice) as granted, and will either decree a legal grant or restrain a disturbance by injunction (f). Again, it was laid down in *Dalton v. Angus* that an agreement for valuable consideration, though not under seal, is sufficient to create a right in equity to an easement, and for the purpose of creating a lawful user is as good as a deed (g).

May v. Belleville.

In *May v. Belleville* (h) two adjoining farms, called "White Lodge" and "Coxhill," had prior to 1902 been owned by the same person, and while united in title the tenants of Coxhill had, by leave (either asked or not), used a way over White Lodge. In 1902 White Lodge was sold under an agreement, in which appeared, at the foot of the description of White Lodge, words to the following effect: "There is reserved to the vendor, his heirs and assigns, the owners and occupiers for the time being of Coxhill, all rights of way hitherto exercised by them in respect of Coxhill over any portion of White Lodge." The conveyance of White Lodge to the purchaser contained a reservation to the vendor, his heirs and assigns, of all rights of way theretofore exercised in respect of Coxhill over White Lodge. This conveyance was executed by the vendor, but not by the purchaser. In an action by the vendor against an assign of the purchaser, it was held by Buckley, J., that the purchaser was bound in equity by the reservation, that the Statute of Frauds did not apply, and that the assign of the purchaser necessarily had notice of the reservation, and was bound thereby, and an injunction was granted restraining the defendant from interfering with the right of way.

McManus v. Cooke.

Again, it has been decided by a Court of Equity that a verbal agreement for an easement may be enforced where there has been part performance. Thus, in *McManus v. Cooke* (i) the plaintiff and defendant, being owners of adjoining houses, had entered into a

(e) Judicature Act, 1873, s. 25, sub-s. 11.

(f) Francis's Maxims, 13; Fonbl. Eq. Bk. 1, p. 6, § 9; compare the decisions as to profits à prendre. At common law a deed was necessary for the creation of a right to a profit à prendre (*Somerset v. Fogwell*, 1826, 5 B. & C. 875; 5 L. J. (O.S.) K. B. 49; 29 R. R. 449; *Bird v. Higginson*, 1839, 2 A. & E. 704; 6 A. & E. 825; 6 L. J. Ex. 1282). In equity, however, an agreement not under seal for a profit à prendre granted

for valuable consideration confers a good interest and will be protected in equity (*Frogley v. Lovelace*, 1859, John. 333; 123 R. R. 147; *Jones v. Tankerville*, 1909, 2 Ch. 443; 78 L. J. Ch. 674).

(g) *Dalton v. Angus*, 1881, 6 App. Cas. 765, 782; 50 L. J. Q. B. 689; see *White v. Grand Hotel, Eastbourne*, 1913, 1 Ch. 113; 82 L. J. Ch. 57.

(h) 1905, 2 Ch. 605; 74 L. J. Ch. 678.

(i) 1887, 35 Ch. D. 681; 56 L. J. Ch. 662.

verbal agreement, under which a party-wall was to be pulled down and rebuilt at their joint expense, and each party was to be at liberty to make a lean-to skylight resting on the new party-wall and running up to the sill of the first-floor window of his own building. The defendant having shaped his skylight so as to show above the wall and obstruct some of the light coming to the plaintiff's skylight, Kay, J., granted an injunction, holding that the agreement was for an easement of light, and that the defence of the Statute of Frauds (if good) was answered by the plaintiff's part performance.

Decision: in equity as to the creation of easements.

In *Hastings v. N. E. R. Co.* (j) the owner in fee of land, by an agreement under seal agreed to grant by lease, in the form set out verbatim in the agreement, a wayleave over his land, with the right to make and use certain railways thereon, and the form of lease embodied in the agreement reserved to the grantor, his heirs and assigns, a periodical payment on coal, &c., carried over certain railways (including railways not running over land of the grantor), and gave to the grantor, his heirs and assigns, powers of distress and entry for non-payment of rent, and contained a covenant by the grantee with the grantor, his heirs and assigns, to pay the rent to him, his heirs and assigns. As to this it was held by Byrne, J., that the interest of the grantee under the agreement (no formal lease having been executed but the grantee having entered and constructed the railways) was not a mere licence, but an incorporeal hereditament, capable of being inherited or assigned, and that the rent, whether for coal carried over the original grantor's land or not, must be regarded as payable in respect of the incorporeal hereditament leased, and was payable, after the death of the original grantor, to his successor in title, as the owner of the reversion within 32 Hen. 8, c. 34, s. 1, and not to the legal personal representatives of the original owner; there being sufficient privity of estate between the owners of the land over which the wayleave was granted, and the grantee, to enable such owners to sue the grantee on the covenant for payment.

Hastings v. N. E. R. Co.

Before *Dalton v. Angus* (ante, p. 64) there had been decisions in equity to the effect that a parol licence for an easement was irrevocable where expense had been incurred and there had been acquiescence. Thus, in *Devonshire v. Eglin* (k) the defendant verbally consented to the plaintiff's making a watercourse through his land on being paid a reasonable compensation. The watercourse was made, but no grant was executed and no sum arranged. After nine years'

Devonshire v. Eglin.

(j) 1898, 2 Ch. 674; 1899, 1 Ch. 656; 67 L. J. Ch. 590; 1900, A. C. 260; 69 L. J. Ch. 516. As to this case see ante,

p. 2, note (k).

(k) 1851, 14 Beav. 530; 92 R. R. 201; 20 L. J. Ch. 495.

Decisions in equity as to the creation of easements.

Moreland v. Richardson.

user the defendant stopped it up ; he was restrained by decree from so doing, and it was referred to the master to settle a proper compensation. The defence of the Statute of Frauds was answered by the part performance. Again, in *Moreland v. Richardson* (l) the plaintiffs had purchased from the trustees of a chapel graves in a burying-ground attached to the chapel, and received receipts for their purchase-money stating that the graves were sold in perpetuity. The Master of the Rolls held that they were entitled to have their family vaults, and the spot on which they were situate, kept undefaced and unobliterated, and enjoined succeeding trustees from removing, defacing, obliterating or injuring the graves and monuments belonging to the plaintiffs. The right of burial was treated as an easement.

It should be noted, however, that if an agreement to grant an easement be voluntary, equity will not interfere to enforce it ; nor will it be enforced against a purchaser for value without notice (m).

(c) *As to the effect of Acquiescence.*

Easements arising from acquiescence.

There are numerous cases in which an agreement to grant an easement or some other right has been inferred—or, more correctly, has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence ; but they may be referred to, for the purpose of classification, as imputed or constructive grants (n).

Statements of the rule.
Dann v. Spurrier.

The rule has been variously stated by the judges as follows :—
“ This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title ; and the circumstance of looking on is in many cases as strong as using terms of encouragement ” (o).

Acquiescence.

“ To have a work erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining

(l) 1856, 22 Beav. 596 ; 26 L. J. Ch. 690 ; 116 R. R. 18 ; compare *Bryan v. Whistler*, ante, p. 42.

(m) *Prinsep v. Belgravian*, 1896, W. N. 39 ; see *Hervey v. Smith*, 1855, 1 K. & J. 394 ; 103 R. R. 860.

(n) Logically these cases should be placed in the succeeding chapter dealing with implied grants of easements. But in the previous editions of this treatise they have been placed in the present chapter, and for the sake of convenience

the same arrangement has been retained.

(o) Lord Eldon in *Dann v. Spurrier*, 1802, 7 Ves. at p. 235 ; 6 R. R. 119. This statement was adopted by Lord Cranworth, V.-C., in *Rochdale Co. v. King*, 1851, 2 Sim. N. S. 88 ; 18 L. J. Q. B. 293 ; 89 R. R. 211 ; and by Romilly, M.R., in *Colchingham v. Bassett*, 1862, 32 Beav. 111 ; 32 L. J. Ch. 286 ; 138 R. R. 657.

should have given notice not to proceed, otherwise the Court will leave the complainant to law " (p). Acquiescence.

" A party, having an equity, loses that equity, as against another person, by permitting him to go on dealing with property in ignorance of such equity " (q). *Williams v. Jersey.*

" He who stands by and encourages an act cannot afterwards complain of it, or interfere with the enjoyment of that which he has permitted to be done " (r). *Beaufort v. Patrick.*

" If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title ; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. *Ramsden v. Dyson.*

" But it will be observed that, to raise such an equity, two things are required : first, that the person expending the money supposes himself to be building on his own land ; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity, which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

" It follows as a corollary from these rules, or perhaps it would be more accurate to say it forms part of them, that, if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest ; and it was his folly to expend money upon a title which he knew would or might soon come to an end " (s).

(p) Per Lord Manners in *Jones v. Royal Canal*, 2 Molloy, 349.

(q) Lord Cottenham in *Williams v. Jersey*, 1844, 1 Cr. & Ph. at p. 96 ; 54 R. R. 219 ; 10 L. J. Ch. 149.

(r) Lord Romilly, M.R., in *Beaufort v. Patrick*, 1853, 17 Beav. at p. 74 ; 22 L. J. Ch. 489 ; 99 R. R. 34. And so

Lord Chelmsford, L.C., in *Somersetshire v. Harcourt*, 1858, 2 De G. & J. 608 ; 27 L. J. Ch. 625 ; 119 R. R. 251.

(s) Lord Cranworth in *Ramsden v. Dyson*, 1866, L. R. 1 H. L. 140. Cf. as to the last point, *A.-G. v. Baldol*, 1744, 9 Mod. 407, 411.

Acquiescence. "If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation" (t).

What is acquiescence. It is an important question what amount or quality of encouragement or acquiescence is sufficient to give rise to the equity. When the encouragement to expenditure is active, and is accompanied either by an actual representation of the alleged grantor's intention to grant the right claimed, or by a silence which may lead to an expectation that the right will be granted, there is of course no doubt that the agreement to grant will be imputed under the rule (u). And, even although there be no active encouragement, if one lie quietly by and witness an expenditure which must be thrown away or greatly diminished in value except it be supplemented by the grant claimed, and if there be to the knowledge of the person so lying by a misconception on the part of the building owner, then the rule appears to take effect (x). But if such a notice be given to the person incurring the expenditure, or if he possess such knowledge as must dispel any misconception as to the intentions of the person in whom the right exists, this is sufficient to prevent the equity from arising (y); and it is not necessary that the notice should be repeated though the

(t) Per Lord Kingsdown in *Ramsden v. Dyson*, 1866, L. R. 1 H. L. 170; quoted by James, V.-C., in *Bankart v. Tennant*, 1870, 10 Eq. 146; *Civil Service Association v. Whiteman*, 1899, 68 L. J. Ch. 484.

(u) *Watercourse Case*, and *Short v. Taylor*, 1710, 2 Eq. Ca. Abr. 522, pl. 3 (below, p. 71); *Cawdor v. Lewis*, 1855, 1 Y. & C. Exch. Eq. 427; *Jackson v. Cator*, 1800, 5 Ves. 688; 5 R. R. 144; *Brydges v. Kilburne*, 1792, cited ib.; *Williams v. Jersey*, 1841, 1 Cr. & Ph. 91; 10 L. J. Ch. 149; 54 R. R. 219 (below, p. 72); *Rochdale Co. v. King*, 1851, 2 Sim. N. S. 78; 16 Beav. 630; 18 L. J. Q. B. 293; 89 R. R. 211; *Beaufort v. Patrick*, 1853, 17 Beav. 60; 22 L. J. Ch. 489; 99 R. R. 34; *Laird v. Birkenhead R. Co.*, 1859, John. 500; 29 L. J. Ch. 218; 123 R. R. 206; *Cotching v. Bassett*, 1862, 32 Beav. 101; 32 L. J. Ch. 286; 138 R. R. 657.

(x) *East India Co. v. Vincent*, 1740, 2 Atk. 83 (below, p. 71); *Clavering's*

Case, per Lord Loughborough, 5 Ves. 690; 5 R. R. 146; *Powell v. Thomas*, 1848, 6 Hare, 300; 77 R. R. 116; *Rochdale Co. v. King*, 1851, ubi sup.; *Mold v. Wheatcroft*, 1859, 27 Beav. 510; 29 L. J. Ch. 11; 122 R. R. 511; *Davies v. Sear*, 1869, 7 Eq. 427; 38 L. J. Ch. 545 (below, p. 76); *Bankart v. Tennant*, 1870, 10 Eq. 141; *Crook v. Seaford*, 1871, 6 Ch. 551. See the observations in *Blanchard v. Bridges* (below, p. 75).

(y) *East India Co. v. Vincent*, 1740, ubi sup., per Lord Hardwicke; *Dann v. Spurrier*, 1802, 7 Ves. 231; 6 R. R. 119; *Pilling v. Armitage*, 1806, 12 Ves. 78, 85; 8 R. R. 295; *Durham R. v. Wawn*, 1840, 3 Beav. 119; 52 R. R. 56; *Ramsden v. Dyson*, 1866, L. R. 1 H. L. 129. Cf. *Kenney v. Browne*, 3 Ridg. 462, 518; *A.-G. v. Baliol*, 1744, 9 Mad. 407, 411. The case of *Birmingham Co. v. Lloyd*, 1812, 18 Ves. 515; 11 R. R. 245, stands on a peculiar footing; see *Haines v. Taylor*, 1847, 2 Phil. 209; 78 R. R. 71.

expenditure continues (z). Acquiescence is of course inoperative without knowledge of the expenditure (a). What is acquiescence

"It has been said," said Fry, J., in *Willmott v. Barber* (b), "that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your own legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it; but, in my judgment, nothing short of this will do."

A company acquiescing in expenditure is as much bound by the rule as an individual (c); and, although an infant incurs no obligation by lying by during his minority (d), yet, if he continue after attaining his full age to permit expenditure to be incurred or rights to be lost, the equity will attach (e). A reversioner is as much bound by his own acquiescence as he would be if he were in possession (f).

(z) *Clare Hall v. Harding*, 1848, 6 Hare, 273; 77 R. R. 115; 17 L. J. Ch. 301.

(a) *Dann v. Spurrer*, 1802, ubi sup.

(b) 1880, 15 Ch. D. 105; 49 L. J. Ch. 792; repeated by the same judge in *C. A., Russell v. Watts*, 1883, 25 Ch. D. 585; 55 L. J. Ch. 158; and see *Civil Service Association v. Whiteman*, 1899, 68 L. J. Ch. 484.

(c) *Rochdale Co. v. King*, 1851, ubi

sup.; *Laird v. Birkenhead R. Co.*, 1859, John. 500; 29 L. J. Ch. 218; 123 R. R. 206; *Crook v. Seaford*, 1871, 6 Ch. 551.

(d) Per Lord Cottenham in *Leeds v. Amherst*, 1846, 2 Phill. 123; 78 R. R. 47; 15 L. J. Ch. 351.

(e) *Somerset Co. v. Harcourt*, 1857, 24 Beav. 571; 2 De G. & J. 596; 27 L. J. Ch. 625; 119 R. R. 251.

(f) *Beaufort v. Patrick*, 1853, 17

Acquiescence. With respect to the manner in which the principle will be enforced, Romilly, M.R., in the case of *Bankart v. Houghton (g)*, made a distinction between a person resisting an injunction on the ground of the acquiescence of the person asking for it and one taking active steps to restrain on this ground an action at law. But it seems to be clear that, since the passing of the Judicature Acts, no such distinction exists; and the principle has been applied, not only as a bar to an injunction (*h*) or action at law (*i*), but as a ground for restraining an act inconsistent with the right claimed (*k*). Whether a legal grant would in any case be decreed, is more doubtful (*l*).

Assign of person acquiescing. The constructive grant is of course merely an equitable right, and would not bind an assignee of the grantor for value without notice. But, in practice, the structure or other work in respect of which the grant is claimed would often be of such a kind that no person could take the property without being put on inquiry as to the grantee's rights, and thus having actual or constructive notice of the equity (*m*).

Grant limited by the necessity. The extent of the constructive grant is, by virtue of the principle on which the rule is founded, limited by the obvious and plain consequences of the act acquiesced in. "For instance, if a neighbour permit me to open a window overlooking his close, he knows the exact consequence of that permission, namely, that he is liable for ever after to be overlooked, and that he cannot afterwards so build on his close as to obscure that window; this is the extent of the injury which can be produced, and he cannot say that he did not

Beav. 60; 22 L. J. Ch. 489; 99 R. R. 34. Cf. as to a mortgagee, *Mold v. Wheatcroft*, 1859, 27 Beav. 510; 29 L. J. Ch. 11; 122 R. R. 511.

(g) 1859, 27 Beav. 425; 28 L. J. Ch. 473; 122 R. R. 471 (below, p. 74).

(h) *Brydges v. Kilburne*, 1792, cited 5 Ves. 689; 5 R. R. 146; *Rochdale Co. v. King*, 1851, 2 Sim. N. S. 73; 20 L. J. Ch. 675; 89 R. R. 211 (below, p. 73).

(i) *Watercourse Case*, 2 Eq. Ca. Abr. 522 (below, p. 71); *Stiles v. Cowper*, 1748, 3 Atk. 692; *Williams v. Jersey*, 1841, 1 Cr. & Ph. 91; 10 L. J. Ch. 149; 54 R. R. 219 (below, p. 72); *Powell v. Thomas*, 1848, 6 Hare, 300; 77 R. R. 116; *Beaufort v. Patrick*, 1853, 17 Beav. 60; 22 L. J. Ch. 489; 99 R. R. 34; *Somerset Co. v. Harcourt*, 1857, 24 Beav. 571; 2 De G. & J. 596; 27 L. J. Ch. 625; 119 R. R. 251; *Davies v. Sear*, 1869, 7 Eq. 427; 38 L. J. Ch. 545.

(k) *East India Co. v. Vincent*, 1740, 2 Atk. 83 (below, p. 71); *Jackson v. Cator*, 1800, 5 Ves. 688; 5 R. R. 144;

Laird v. Birkenhead R. Co., 1859, John. 500; 29 L. J. Ch. 218; 123 R. R. 206 (below, p. 73); *Cotching v. Bassett*, 1862, 32 Beav. 101; 32 L. J. Ch. 286; 138 R. R. 657 (below, p. 74); *Civil Service Association v. Whiteman*, 1899, 68 L. J. Ch. 484.

(l) See and consider *Stiles v. Cowper*, 1748, 3 Atk. 692; *Clavering's Case*, 5 Ves. 690; 5 R. R. 146; *Hardcastle v. Shafto*, 1793, 1 Anstr. 184; *Beaufort v. Patrick*, 1853, ubi sup.; *Somerset Co. v. Harcourt*, 1857, ubi sup.; *Laird v. Birkenhead R. Co.*, 1859, John. 500; 29 L. J. Ch. 218; 123 R. R. 206; *Crook v. Seaford*, 1871, 6 Ch. 551. In some of these cases there was a pre-existing parol agreement.

(m) See and consider *Beaufort v. Patrick*, 1853, 17 Beav. 60; 22 L. J. Ch. 489; *Mold v. Wheatcroft*, 1859, 27 Beav. 510; 29 L. J. Ch. 11; *Bankart v. Houghton*, 1859, ib. 425; 28 L. J. Ch. 473; *Allen v. Seckham*, 1879, 11 Ch. D. 790; 48 L. J. Ch. 611.

foresee it. . . . But, if a copyholder allow the lord of the manor to work the coals under the close of the copyhold by offset out of the adjoining land, does it therefore follow that, if the lord, in winning the coal, works so near the surface as to destroy the farm buildings of the copyholder, he is to have no remedy at law for the injury so done to him? . . . Certainly not. But, in truth, all such illustrations present a weaker case than that before the Court; and the strongest illustration of the distinction to be taken in such cases appears to me to be the case of works erected, which at first seem to be and are innocuous, and which afterwards, by addition, become seriously injurious to the proprietors of the neighbouring lands" (n).

Many of the cases which illustrate this principle refer to claims for a lease (o) or for a sale (p) of the fee simple estate in land, and are not strictly relevant to the subject of this treatise. But the following cases bear directly or indirectly on the acquisition of easements or of rights of a similar nature (q).

In the *Watercourse Case* (r), A. diverted a watercourse, which put B. to great expense in laying of soughs, &c., and the diversion being a nuisance to B., he brought an action; but an injunction was decreed (s), it being proved that B. did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. A case of *Short v. Taylor*, before Lord Somers, was cited, where Taylor, in building his house, laid his foundations on Short's land, he standing by and encouraging him, and an injunction was granted against his proceeding with an action for the trespass.

In *East India Co. v. Vincent* (t), it would appear that the agent of

East India Co. v. Vincent.

(n) Per Romilly, M.R., in *Bankart v. Houghton*, 1859, 27 Beav. 425, 433; 28 L. J. Ch. 473. Cf. *Rochdale Co. v. King*, 1851, 20 L. J. (N. S.) Ch. 675; 89 R. R. 211; per Lord Cranworth, 2 Sim. N. S. at p. 90; 89 R. R. 211; *Tipping v. St. Helen's Co.*, 1865, 1 Ch. 66; and *Bankart v. Tennant*, 1870, 10 Eq. 141 (below, p. 76).

(o) *Edlin v. Battaly*, 1687, 2 Lev. 152; *Hauing v. Ferrers*, 1711 Gilb. Eq. Rep. 85; *Hardcastle v. Shafto*, 1793, 1 Anstr. 184; *Stiles v. Couper*, 1748, 3 Atk. 692; *Dann v. Spurrier*, 1802, 7 Ves. 231; 6 R. R. 119; *Pilling v. Armitage*, 1806, 12 Ves. 78; 8 R. R. 295; *Durham R. v. Wawn*, 1840, 3 Beav. 119; 52 R. R. 56; *Clare Hall v. Harding*, 1848, 6 Hare, 273; 77 R. R. 115; 17 L. J. Ch. 301; *Ramsden v. Dyson*, 1866, L. R. 1 H. L. 129; *Crook v. Seaford*, 1871, 6 Ch. 551; *Willmott*

v. Barber, 1880, 15 Ch. D. 96; 49 L. J. Ch. 96. See also, as to questions between landlord and tenant, *Jackson v. Cator*, 1800, 5 Ves. 688; 5 R. R. 144, and *Brydges v. Kilburne*, 1792, there cited.

(p) *Powell v. Thomas*, 1848, 6 Hare, 300; 77 R. R. 116; *Beaufort v. Patrick*, 1853, 17 Beav. 60; 22 L. J. Ch. 489; 99 R. R. 34; *Somerset Co. v. Harcourt*, 1837, 24 Beav. 571; 2 De G. & J. 596; 27 L. J. Ch. 625; 119 R. R. 251; *Mold v. Wheatcroft*, 1859, 27 Beav. 510; 29 L. J. Ch. 11; 122 R. R. 511.

(q) See also *Deaconsheir v. Eglin*, 1851, 14 Beav. 530; 20 L. J. Ch. 495; 92 R. R. 201.

(r) 1709, 2 Eq. Ca. Abr. 522, pl. 3.

(s) I.e., against the continuance of the action at law by B.

(t) 1740, 2 Atk. 83.

Acquiescence. the company and the defendant, a packer, agreed that the company should be at liberty to build on the defendant's ground, or with windows overlooking his ground, and that they should employ him during the term of his estate double to any other packer, provided he worked at the same rate as any other packer. As they did not employ him as agreed, he built a wall to block up their light, and Lord Hardwicke held that he ought to have brought his bill to establish the agreement, and decreed that the wall should be pulled down and that the company should perform the agreement to employ. "There are several instances where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right, in which the Court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. But these cases have never been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement; then, if persons will build notwithstanding, they must take the consequence, as this is not such an acquiescence on the part of the owner as will prevent him from insisting on his right."

Clavering's Case.

Clavering's Case was cited by Lord Loughborough in *Jackson v. Cator* (u). He says: "There was a case (I do not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and, when the work was begun, he said he would not give the road. The end of it was that he was made sensible—I do not know whether by a decree or not—that he was to give the road at a fair value."

Williams v. Jersey.

Williams v. Jersey (x) was a suit to restrain the defendant from suing at law for a nuisance caused by copper works erected by the plaintiff at a great expense; and it was alleged that, during the progress of the works, the defendant was well aware that they were being erected and were for the smelting of copper; that, nevertheless, he allowed the plaintiff to proceed and expend large sums of money thereon, and in completing and finishing the same with the requisite machinery and plant, without making any objection, and that he acquiesced in and encouraged the erection and expenditure. A demurrer to the bill was overruled.

(u) 1800, 5 Ves. 690; 5 R. R. 144; *Tennant*, below, p. 76.
 cited by James, V.C., in *Bankart v.* (x) 1841, 1 Cr. & Ph. 91; 54 R. R. 219.

In *Rochdale Co. v. King* (y) there was a motion to restrain the defendants, mill-owners, from drawing water from the canal for any purpose other than for condensing steam (which was allowed by the Canal Act). The defendants, by their answer, stated that, when their mill was erected, notice was given to the company of the intention to make a communication with the canal, not only for the purpose of condensing steam, but for other purposes; that the company superintended the laying of the pipes, and were aware of the uses to which they were to be applied, and made no objection, though they were cognizant of the great expense incurred. Lord Cranworth, V.-C., said: "If this be true, the plaintiffs can have no relief in this Court. Such conduct, even if it be not sufficient to sustain a plea of leave and licence in bar to an action, certainly incapacitated the plaintiffs from obtaining any assistance in a court of equity. It is not necessary to go further, and say whether it would not entitle the defendants to restrain them from proceeding at law, according to what is stated by Lord Eldon in *Barrett v. Blagrove* (z). I entirely assent to the argument, very ably urged by Mr. Baily, that mere acquiescence (if by acquiescence is meant the abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations. If, therefore, from 1830 to 1847, when the disputes began, the plaintiffs might have asserted the legal right on which they now insist, their not having done so during that period would not preclude them. But the evidence of long-continued use of the water for all purposes by the adjacent mill-owners may be very important as tending to satisfy this Court that, when the mill of the defendants was erected, the plaintiffs must have known that King, who was building it, was laying out his money in the expectation that he would have the same privilege of using the water as was enjoyed by all his neighbours." Subsequently, Sir John Romilly, M.R., refused a perpetual injunction on the same grounds, notwithstanding some fresh evidence directed to the point that the company had made objection before the erection of the mill (a).

In *Laird v. Birkenhead R. Co.* (b) the plaintiff, under a treaty with the defendants for a communication between his shipbuilding yard

Acquiescence.
Rochdale Co.
v. King.

Laird v.
Birkenhead
R. Co.

(y) 1851, 2 Sim. N. S. 78; 89 R. R. 211.

(a) 16 Beav. 630.

(b) 1859, John. 500; 29 L. J. Ch. 218; 123 R. R. 206.

(z) 1801, 6 Ves. 105.

Acquiescence. and their station, constructed a tunnel and laid down rails at an expense of £1,200, and was allowed by the company to use it for two and a half years, during which time they received from him tolls for the use of the way. Because they did not finally agree as to the terms, the company gave him three months' notice to quit, and were about to take up the rails; but they were restrained by the Vice-Chancellor, who held that, notwithstanding their being a corporation, they were as much bound by their acquiescence as an individual, and were bound to allow the plaintiff the use of the way on reasonable terms, i.e., on the terms which had existed during the two and a half years, and for a reasonable time, which he considered to be for as long as the plaintiff continued owner of the yard.

Bankart v. Houghton.

In *Bankart v. Houghton* (c) the plaintiff sought to restrain the defendant from enforcing a judgment at law in an action for a nuisance caused by copper works, on the ground that when he took his farm he was aware of the works, and his lessor had seen them while in course of erection, and took no steps to prevent their erection. The Master of the Rolls held that this was not an acquiescence which conferred on the plaintiff the right to cause noxious effluvia and vapour to issue from his furnaces and be deposited on the defendant's lands. He also said: "It is impossible to hold that, because a man has acquiesced in certain works which produce little or no injury, he is ever afterwards to be debarred of remedy if, by the increase of the works, he sustains a serious injury."

Cotching v. Bassett.

In *Cotching v. Bassett* (d) the plaintiffs were lessees of No. 32, Wood Street, and the defendants owners of No. 33, which, until Michaelmas, 1861, was let to the plaintiffs. The plaintiffs, being about to rebuild No. 32, agreed with the defendants that they should continue tenants of No. 33 to Lady Day, 1862, and rebuild the party-wall. In rebuilding, the plaintiffs altered the windows and made additional windows, and submitted their plans to the defendants' surveyor, and the works were executed under the superintendence of the defendants' surveyor, who made no objection to the plans or as to the mode in which the works were being carried out. After the plaintiffs had completed the rebuilding of No. 32, the defendants gave them notice of their intention to raise the party-wall in a manner greatly to interfere with the plaintiffs' lights. The Master of the Rolls restrained them, and held that the case came within the principle of *Dann v. Spurrier*, saying: "If the defendant intended to obtain an advantage not then possessed by him, and to derive

(c) 1859, 27 Beav. 425; 28 L. J. Ch. 473; 122 R. R. 471.

(d) 1862, 32 Beav. 101; 32 L. J. Ch. 286; 138 R. R. 657.

it by reason of the acts which the plaintiffs might be induced to perform, it was incumbent on him to explain this to the plaintiffs in such a manner that it could not be misunderstood.” Acquiescence.

Blanchard v. Bridges (c) was a case at law. There it appeared that the predecessor in title of the plaintiff had erected a cottage on his land, having windows which derived light from the adjoining property of his vendor, and had afterwards thrown the windows forward and converted them into bow windows. The owner of the adjoining property was often on the spot during the progress of the works, and had a general knowledge of their nature, and made no objection; but it appeared that the adjoining land had been from time to time advertised for sale in lots for building, and that the owner had on two occasions, in treating with the plaintiff's predecessor in title, specifically reserved the right to build up to the boundary of the plaintiff's property. The defendant, having subsequently purchased the adjoining property, erected a wall which interfered with the light coming to the bow windows; and this action was therefore brought to establish the right to the light. *Blanchard v. Bridges.*

The Court of King's Bench refused to presume a grant of the light on the ground of acquiescence; and Patteson, J., who delivered the judgment of the Court, said: “The fullest knowledge, with entire but mere acquiescence, cannot bind a party who has no means of resistance. There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his adjoining land, should be at liberty by subsequent erections to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection: and this with good reason. For it is far more just and convenient that the party who seeks to add to the enjoyment of his own land by anything in the nature of an easement upon his neighbour's land should first secure the right to it by some unambiguous and well-understood grant of it from the owner of the land, who thereby knows the nature and extent of his grant, and has a power to withhold it or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually, as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided, as we daily see, by litigation.”

Acquiescence.
Remarks on
Blanchard v.
Bridges.

These words are quoted here at length because of their bearing on the principle of the equitable decisions on the doctrine of constructive grant. But it should be noted that they express the opinion, not of a court of equity, but of a court of law; and it is conceived that they are opposed to the principle adopted by the equitable Courts, where entire but mere acquiescence, coupled with knowledge on the one side and misconception on the other, is sufficient to bind the party acquiescing (*f*). He has no means of resistance; but he may by notice remove the misconception. With respect to the actual decision, there were facts in the case which to some extent negatived the plea of misconception on the part of the building owner; and it is remarkable also that the acquiescence was the acquiescence not of the defendant but of a prior owner, and there was no evidence of express notice (*g*).

Davies v.
Sear.

The case of *Davies v. Sear* (*h*), which is quoted later (*i*) as illustrating the implied grant of ways of necessity, has also a bearing on the doctrine of constructive grant by acquiescence. The evidence in the case, so far as it bore upon the latter point, was to the effect that the defendant, who owned the soil of a passage leading to certain mews belonging to the plaintiff, allowed the plaintiff to block up by building all other access to the mews, and then obstructed the passage. Lord Romilly, M.R., granted an injunction, partly on the authority of *Dann v. Spurrer* (*k*) and the other cases of acquiescence. "A man cannot," he said, "stand quiet, and see it (the adjoining ground) gradually become covered with houses, so that every access or means of communication with the mews is shut out except this one, which he had always known was intended to be used as a means of access, and then say this easement was not reserved."

Bankart v.
Tennant.

In *Bankart v. Tennant* (*l*) the plaintiffs had erected furnaces and smelting works upon the banks of a canal belonging to the predecessor in title of the defendant, and had for some time (while they were customers of the canal-owners) been permitted to extract water from the canal for the use of their works. They now claimed a right to the water under the authority of *Clavering's Case*; but the claim was negatived by James, V.-C., on the ground that the water was not essential, nor anything like essential, to the enjoyment of the plaintiffs' property. He added that it was impossible to suppose that the canal-owners could have intended to part with their

(*f*) See the cases quoted above, p. 68.
(*g*) See above, p. 70, and especially
Allen v. Seckham, 1879, 11 Ch. D. 790;
48 L. J. Ch. 611.

(*h*) 1869, 7 Eq. 427; 38 L. J. Ch. 545.
(*i*) See Part II., Chap. 2, sect. 2, post.
(*k*) 1802, 7 Ves. 231; 6 R. R. 119.
(*l*) 1870, 10 Eq. 141.

absolute control over the canal, or with their power of letting the water off or keeping the canal idle; and therefore he did not think the plaintiffs could have acted upon the notion that they were to get a binding agreement with respect to the enjoyment of the water. Acquiescence.

SECT. 3. — *Form of the Instrument and General Rules as to the Construction thereof.*

Easements may be granted separately and apart from any conveyance of the dominant tenement, or they may be included in a conveyance of it. Form and construction of grant.

But few cases are to be found in the books of a grant of an easement per se; it is obvious, however, that, in all instances of this kind, the precise words of the instrument itself must determine the extent of the right created (*m*).

An easement is usually created for an absolute interest and so as to be continuously appurtenant to the dominant tenement. In which case it will subsequently pass by the conveyance of the dominant tenement without special mention (*n*). An easement, however, may by deed be created for a term of years (*o*).

A man may have a way or other easement by grant at the common law; as if A. grants that B. shall have a way through his close (*p*) or grants such a way to B., his heirs and assigns (*q*). Form of grant at common law.

An easement could not, before 1882, be created by a grant under the Statute of Uses; "for a man cannot walk over ground to the use of a third person," and "there cannot be the use of a thing not in esse, as a way, common, &c., newly created" (*r*). It followed from this that an easement could not be created under a power, or by bargain and sale, or by way of reservation; and further that, as a reservation of an easement to the grantor, contained in Grant under the Statute of Uses.

(*m*) See *Senhouse v. Christian*, 1787, 1 T. R. 560; 1 R. R. 300; *Mitcalfe v. Westaway*, 1864, 34 L. J. C. P. 113; *Ardley v. St. Pancras*, 1870, 39 L. J. Ch. 871; *Taylor v. St. Helen's*, 1877, 6 Ch. D. 264; 46 L. J. Ch. 861; and below, Part IV., Chap. 3. "Extent and mode of enjoyment."

(*n*) Co. Litt. 121 b; *Sheppard's Touchstone*, 89.

(*o*) *Wheaton v. Maple*, 1893, 3 Ch. 65; 63 L. J. Ch. 953; see *Kilgour v. Gaddes*, 1904, 1 K. B. 466; 73 L. J. K. B. 233; and *Booth v. Alcock*, 1873, 8 Ch. 663; 42 L. J. Ch. 557. On the other hand, by prescription an easement can only be

acquired for an absolute interest (*ib*).

(*p*) Com. Dig. Chimin. D. (3).

(*q*) *Senhouse v. Christian*, 1787, 1 T. R. 560; 1 R. R. 300; cf. *Gerrard v. Cooke*, 2 N. R. 102, 2nd ed. 109; *Holms v. Siller*, 1697, 3 Lev. 305; as to the devolution of a right so granted, see *Dynevor v. Tennant*, 1888, 13 App. Cas. 279; 57 L. J. Ch. 1078; *Rymer v. McLroy*, 1897, 1 Ch. 528; 66 L. J. Ch. 336.

(*r*) Bac. Abr. Uses, F., citing *Beaudely v. Brook*, 1608, Cro. Jac. 189. Cf. Com. Dig. Chimin. D. (3), ad fin. The section appears to relate only to "estates."

a conveyance of land, could only operate as a re-grant, such a conveyance must be executed by the grantee of the land (s).

Conv. Act,
1881, s. 62.

But now the Conv. Act, 1881, provides as follows:—“(1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly. (2) This section applies only to conveyances made after the commencement of this Act” (t).

It is conceived that this section is intended to alter the mode of conveyance only, and does not authorize the creation of easements of a novel kind, such as easements in gross or not connected with the enjoyment of a tenement. By virtue of this section, an easement may now be reserved, or may be granted under a power.

Construction
of grant.

It is not within the scope of this work to discuss the rules applicable to the construction and interpretation of deeds and other written instruments (u). It may, however, be shortly stated that, in construing the grant or other instrument whereby the easement is created, the document itself, and that only, can, in the first instance, be looked at to discover the extent and nature of the easement and the other terms of the grant. If on the face of the document no doubt arises that the words are used in their primary sense, and if, read in that sense, they are plain and unambiguous, the matter is concluded. No further evidence of any kind can be admitted to show that the document does not, or was not intended to, create the easement in the exact terms of the primary meaning which the words bear. But if, on the face of the document, it appears that the words may be used in some sense other than that which they would naturally bear, or if there is some ambiguity or omission apparent in the document itself, then the circumstances existing at the time when the instrument was executed may properly receive attention.

(s) *Durham R. Co. v. Walker*, 1842, 2 Q. B. 940, at p. 967; 11 L. J. (N. S.) Ex. 140; 57 R. R. 842. But see *May v. Belleville*, 1905, 2 Ch. 605; 74 L. J. Ch. 678.

(t) 44 & 45 Vict. c. 41, s. 62. As to

the meaning of “conveyance” and “land,” see the interpretation clause in s. 2 of same Act.

(u) See, upon this subject, Norton on Deeds.

“Where, indeed, words have a clear, definite meaning, no evidence can be admitted to explain or control them” (x). Construction of grant.

“But if on the face of a document, when applied by extrinsic evidence, it appears that words are used, or may be used, in a more extensive or a different signification than their primary, it becomes a question what more or other is included than would be included in the words in their primary signification” (y).

“Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land, where the words are capable of either construction” (z).

“The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of execution may always be enquired into; and as with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. These deeds are to be construed by evidence of the manner in which the subject has been possessed or used; for, as Lord Coke observes, ‘*optimus interpret rerum usus*’ (2 Ins. 282; *Weld v. Hornby*, 7 East, 199; *Beaufort v. Swansea*, 3 Exch. 413). Lord Hardwicke, with reference to the construction of ancient grants and deeds, says, ‘There is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by.’ That was in the case of *A.-G. v. Parker* (1 Ves. 43; 3 Atk. 576). Lord St. Leonards follows in *A.-G. v. Drummond* (1 Dru. & War. 368), and says one of the most settled rules of law is that you may resort to contemporaneous usage for the meaning of a deed. ‘Tell me what you have done under such a deed, and I will tell you what the deed means.’

“When the evidence of all material facts is exhausted, and there

(x) *Waterpark v. Fennell*, 1859, 7 H. L. C. 650; per Lord Cranworth, at p. 680; 115 R. R. 317.

(y) *Ibid.*, per Bramwell, B., p. 661.

(z) *Ibid.*, per Lord Chelmsford, p. 678.

is still ambiguity, no parol evidence of the grantor's intention, as distinguished from extrinsic facts, can be admissible, except in the single case of there being two subjects, or two objects, to which the terms of the instrument are equally applicable" (a).

Questions of construction of documents dealing with easements have arisen chiefly upon the grant or reservation of ways and minerals, and the cases in which particular documents creating or reserving such easements have been construed by the Court are dealt with in the chapters on Rights of Way and Rights to Support.

To convey an easement (which is an incorporeal hereditament) the use of the word "grant" is not necessary (b). A covenant or other instrument under seal, clearly evincing the intention of the parties, may operate as a grant (c); and upon a grant or covenant conferring an easement, the successive owners of the dominant tenement, who, in the case of an ordinary covenant, would, at common law, be strangers to the contract, become entitled to the benefit of the rights conferred, and may sue for a violation of them.

Easements, in general, bear a strong resemblance to restrictive covenants running with the land (cc). As regards restrictive covenants, the better opinion is that at common law the burden does not (except in cases between landlord and tenant) run with the land so as to bind an assignee (d). It accordingly becomes important to determine in each case whether the terms of the covenant are such as to create an easement. If an easement is created, it will give the successive owners of it a right as against all the succeeding owners of the land affected by it, without regard to any question as to the burden of covenants running with land.

Form of
grant.
Use of
covenant.

Rules as to
restrictive
covenants
running with
the land.
(a) Burden of
covenant.
Rule at law.

(a) *Ibid.*, per Lord Wensleydale, p. 684. And see *Van Diemen's Land v. Marine Board*, 1906, A. C. 92; 75 L. J. P. C. 20.

(b) *Conv. Act*, 1881, s. 49.

(c) *Holms v. Seller*, 1697, 3 Lev. 305. See the judgment of Lord Wensleydale in *Rowbotham v. Wilson*, 1860, 8 H. L. C. p. 362; 30 L. J. Q. B. 49; 125 R. R. 192; *Oakley v. Adamson*, 1832, 8 Bing. 356; *Northam v. Hurley*, 1853, 1 E. & B. 665; 22 L. J. Q. B. 183; 103 R. R. 329; *Low v. Innes*, 1864, 10 Jur. N. S. 1037; *Miles v. Tobin*, 1867, 16 W. R. 465; *Conv. Act*, 1881, s. 49. As to the effect of a deed intended to operate as a covenant as well as a grant, see *Rymer v. McIlroy*, 1897, 1 Ch. 534; 66 L. J. Ch. 336.

In his opinion given to the House of Lords in *Dalton v. Angus*, Fry, J., said that a negative right does not lie in

grant, but would be created by covenant (6 App. Cas. at pp. 771, 773). The opinion of Littledale, J., in *Moore v. Rawson*, 1824, 3 B. & C. 340; 27 R. R. 375; 3 L. J. K. B. 32, supports this view. And see *G. N. R. v. Inland Revenue Commrs.*, 1901, 1 Q. B. 429; 70 L. J. K. B. 336; *Hall v. Lichfield*, 49 L. J. Ch. 656. But see per Lords Selborne and Blackburn, 6 App. Cas. 794, 823.

(cc) See ante, pp. 2, 13, 29.

(d) See notes to *Spencer's Case*, *Smith's L. C.*, 11th ed., vol. i., p. 55; and *Austerberry v. Oldham*, 1885, 29 Ch. D. 750; 55 L. J. Ch. 633; *White v. Southend Co.*, 1897, 1 Ch. 767; 66 L. J. Ch. 387. *Morland v. Cook*, 1868, 6 Eq. 252; 37 L. J. Ch. 825, which might appear to make against the proposition, is now treated as a case of grant.

In *Rowbotham v. Wilson* (e), where the plaintiff sued the defendant for damage done to land and houses, by the defendant so working the subjacent minerals as to let down the surface, much discussion took place as to the effect of a covenant by the owner of land that the owner of certain minerals under it shall have a right to work the minerals, without liability for letting down the surface, the defendant relying, amongst other points, upon the effect of such a covenant; and Lord Wensleydale pointed out that such a covenant would operate as a grant, and that the grantee in that way would obtain the right to work the minerals in the manner claimed. His Lordship said: "This was no doubt the proper subject of a grant, as it affected the land of the grantor; it was a grant of a right to disturb the soil from below and alter the position of the surface, and is analogous to the grant of right to damage the surface by making a way over it. No particular words are necessary for such a grant; any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose. If the words used could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the lands in the hands of the assignee of the covenantors, but if they amount to a grant the grant would be unquestionably good and bind the subsequent owners."

Burden of
restrictive
covenant.

Rowbotham v.
Wilson.

Some of the judges in the Exchequer Chamber, when the same case was before that Court, appear to have been of opinion that a covenant by the owner of land, that the owner of the minerals under it, or of a right to get minerals, might work without liability for damage to the surface, could only operate as a mere covenant not to sue, and therefore would not bind an assignee of the land; not recognizing the analogy pointed out by Lord Wensleydale between such a right and the right to damage the surface by making a way over it. It is hardly necessary to point out that the principle involved in the judgment of Lord Wensleydale would be equally applicable to a grant of the right to let down the surface by working underneath made "per se" to a person already the owner either of the whole adjacent soil, or of the right to work certain minerals in that soil, as to the case where the two rights are conferred by the same instrument, as in *Rowbotham v. Wilson*.

In all such cases the questions would appear (without regarding the particular *form* of words used) to be:—(1) Does an intention appear to confer a right to affect the land of the grantor or covenantor?

(e) 1860, 8 H. L. C. 348, 362; 30 L. J. Q. B. 49; 125 R. R. 192. See *Sitwell v. Londesborough*, 1905, 1 Ch. 460; 74 L. J. Ch. 254.

Burden of
restrictive
covenant.

(2) Is this right one of those as to which, either from decided cases or by analogy, it can be said that it is a right capable of being made the subject of a grant as an easement? If these two questions be answered in the affirmative, an easement has been created, and the grantee and his assignees have the right, as against the grantor or his assignees, without reference to any question as to the burden of covenants running with the land so as to bind an assignee.

Rule in
equity.

In equity, the rule as to the burden of restrictive covenants binding land is different from the above rule at common law. Any covenant entered into by the owner of land with an adjoining owner, that he and his assigns will abstain from using his land in any particular way, binds the land in equity without regard to the question whether such covenant runs with the land or not. And such a covenant can be enforced against any subsequent owner of the land, unless the latter is in a position to set up the defence of bona fide purchase for value without notice, and has the legal estate. The benefit of such a restrictive covenant is analogous to an equitable interest in the land affected by the covenant, and, like such an equitable interest, is liable to be defeated, by the legal estate being obtained by a third party without notice of the equity (f).

But the principle does not extend to affirmative covenants, or covenants to do acts or spend money upon the land (g).

(f) *In re Nisbet and Potts*, 1905, 1 Ch. 391; *affid.*, 1906, 1 Ch. 386; 75 L. J. Ch. 238. And see *Tulk v. Moxhay*, 1848, 2 Phil. 774; 18 L. J. (N. S.) Q. B. 83; 78 R. R. 289; *Jay v. Richardson*, 1862, 30 Beav. 563; 31 L. J. Ch. 398; 132 R. R. 418; *Clegg v. Hands*, 1890, 44 Ch. D. 583; 59 L. J. Ch. 477; *Mander v. Falcke*, 1891, 2 Ch. 554; 61 L. J. Ch. 3; *John Brothers v. Holmes*, 1900, 1 Ch. 188; 69 L. J. Ch. 149; *Rogers v. Hosegood*, 1900, 2 Ch. 388; 69 L. J. Ch. 652; *Holloway v. Hill*, 1902, 2 Ch. 612; 71 L. J. Ch. 818; *Brigg v. Thornton*, 1904, 1 Ch. 386; 73 L. J. Ch. 301. As to what is constructive notice in this respect, see *Daniels v. Davison*, 1809, 16 Ves. 242; 10 R. R. 171, and *Cavander v. Bulloch*, 1873, 9 Ch. 79; 43 L. J. Ch. 370 (notice imputed for omission to inquire as to tenants' interests); *Maxfield v. Burton*, 1873, 17 Eq. 15; 43 L. J. Ch. 46; and *Spencer v. Clarke*, 1878, 9 Ch. D. 137; 47 L. J. Ch. 692 (omission to inquire as to interests of holders of title-deeds); *Miles v. Tobin*, 1868, 16 W. R. 465; *Morland v. Cook*, 1868, 6 Eq. 252; 37 L. J. Ch. 825; *Davies v. Sear*, 1869, 7 Eq. 427; 38

L. J. Ch. 545; and *Allen v. Seckham*, 1879, 11 Ch. D. 790; 48 L. J. Ch. 611 (omission to inquire into structural peculiarities); *Carter v. Williams*, 1870, 9 Eq. 678; 39 L. J. Ch. 560 (as explained in *Patman v. Harland*, 1881, 17 Ch. D. 353; 50 L. J. Ch. 642); and *Kettlewell v. Watson*, 1884, 26 Ch. D. 501; 53 L. J. Ch. 717 (omission to look into vendor's title); *Wilson v. Hart*, 1866, 1 Ch. 463; 35 L. J. Ch. 569; *Patman v. Harland*, 1881, 17 Ch. D. 353; 50 L. J. Ch. 642; and *In re Nisbet and Potts*, *ubi sup.* (omission to look into lessor's title); *Conv. Act*, 1882, s. 3; *Dart, V. & P.*, 7th ed. p. 775.

(g) *Haywood v. Brunswick*, 1881, 8 Q. B. D. 403; 51 L. J. Q. B. 73; *London & S. W. R. v. Gomm*, 1881, 20 Ch. D. 562; 51 L. J. Ch. 530; *Andrew v. Aitken*, 1882, 22 Ch. D. 218; 52 L. J. Ch. 294; *Austerberry v. Oldham*, 1885, 29 Ch. D. 750; 55 L. J. Ch. 633; *Hall v. Ewin*, 1887, 37 Ch. D. 74; 57 L. J. Ch. 95. In *Catt v. Tourle*, 1869, 4 Ch. 654; 38 L. J. Ch. 665, a covenant in terms positive was held to be in substance negative, and enforceable against the land.

Covenants of this kind, whether affirmative or negative, cannot be enforced by a subsequent purchaser from the covenantee, unless either the benefit of them is such as to run with the land of the covenantee, or the covenantee has manifested an intention of obtaining, for the benefit of particular property owned by him, or of transferring to the purchaser, or of obtaining for his benefit, the covenants in question (*h*). Such an intention is a question of evidence; and where the whole property has been laid out as a building estate under a general scheme, the common vendor may almost always be held to be a trustee of the covenants for the benefit of the estate as a whole and of its several parts (*i*). When such intention has been manifested, and the benefit of a restrictive covenant has been once clearly annexed to land, there is a presumption that it passes by an assignment of that land. In such a case the benefit of covenant may be said to run with the land in equity, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption (*k*).

(*h*) Benefit of restrictive covenant.

A restrictive covenant may cease to become enforceable by reason of a change in the character of the neighbourhood (*l*), or by continued acquiescence in a breach (*m*).

Cesser of covenant.

SECT. 4.—*Effect of a Conveyance of the Dominant Tenement.*

A. *As to Rights legally appurtenant to the Tenement conveyed.*

Where the dominant tenement itself is conveyed, whether in fee or for any less estate, all rights which, as against third parties, the conveying party enjoyed as appurtenant to his estate, pass with it although there is no express mention of such rights, and although no such words as “with the appurtenances” or the like are used (*n*).

Conveyance of dominant tenement.

(*h*) *Keates v. Lyon*, 1869, L. R. 4 Ch. 218; 38 L. J. Ch. 357; *Renals v. Cowlishaw*, 1879, 11 Ch. D. 866; 48 L. J. Ch. 830; cf. *Master v. Hansard*, 1876, 4 Ch. D. 718; 46 L. J. Ch. 505; *King v. Dickeson*, 1889, 40 Ch. D. 596; 58 L. J. Ch. 464.

(*i*) *Western v. Macdermott*, 1866, 2 Ch. 72; 36 L. J. Ch. 76; *Eastwood v. Lever*, 1864, 33 L. J. Ch. 355; 12 W. R. 195; *Nottingham v. Butler*, 1886, 16 Q. B. D. 778; 55 L. J. Q. B. 280; *Collins v. Castle*, 1887, 36 Ch. D. 243; 57 L. J. Ch. 76; *Sheppard v. Gilmore*, 1887, 57 L. T. 614; 57 L. J. Ch. 6; *Davis v. Leicester*, 1894, 2 Ch. 208; 63 L. J. Ch. 440; *Holford v. Acton*, 1898, 2 Ch. 240; 67 L. J. Ch. 636; cf. *Hudson v. Cripps*, 1896, 1 Ch. 265; 65 L. J. Ch.

328; *Irving v. Turnbull*, 1900, 2 Q. B. 129; 69 L. J. Q. B. 593.

(*k*) *Rogers v. Hosegood*, 1900, 2 Ch. 388; 69 L. J. Ch. 652; *In re Nisbet and Potts*, *ubi sup.*; cf. *Formby v. Barker*, 1903, 2 Ch. 539; 72 L. J. Ch. 716.

(*l*) *Bedford v. British Museum*, 1882, 2 My. & K. 552; 2 L. J. Ch. 129.

(*m*) *Sayers v. Collyer*, 1885, 28 Ch. D. 103; 54 L. J. Ch. 1; *Gaskin v. Balls*, 1879, 13 Ch. D. 324. See *Knight v. Simmonds*, 1896, 2 Ch. 294; 65 L. J. Ch. 583.

(*n*) 11 Hen. 6, 22, pl. 19; 2 Rolle, Abr. 60, pl. 1; *Beaudely v. Brook*, 1608, Cro. Jac. 289; *Skull v. Glenister*, 1863, 7 L. T. Rep. 826. See Norton on Deeds, 250.

Conveyance
of dominant
tenement.

The above rule governs all conveyances. But in the case of conveyances executed since 1881 regard must be had to the following statutory provisions.

Conv. Act,
1881, s. 6.

The Conv. Act, 1881, s. 6 (o), provides as follows:—

“(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings, erections, fixtures, commons, hedges, ditches, fences, ways (*p*), waters, watercourses (*q*), liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

“(2) A conveyance of land having houses or other buildings thereon shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all out-houses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights (*r*), watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed or any of them or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land, houses, or other buildings conveyed or any of them or any part thereof.

“(3) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishing, fisheries, fowlings, courts-leet, courts baron, and other courts, views of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciements, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seek, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain or at the time of conveyance demised, occupied, or

(o) 44 & 45 Vict. c. 41, s. 6.

(p) *International Stores v. Hobbs*, 1903, 2 Ch. 165; 72 L. J. Ch. 543.

(q) *Burrows v. Lang*, 1901, 2 Ch. 502; 70 L. J. Ch. 607.

(r) *Birmingham Bank v. Ross*, 1888, 38 Ch. D. 295; 57 L. J. Ch. 601;

Broomfield v. Williams, 1897, 1 Ch. 602; 66 L. J. Ch. 655; *Born v. Turner*, 1900, 2 Ch. 211; 69 L. J. Ch. 593; *Pollard v. Gare*, 1901, 1 Ch. 834; 70 L. J. Ch. 404; *Godwin v. Schweppes, Ltd.*, 1902, 1 Ch. 926; 71 L. J. Ch. 438; *Quicke v. Chapman*, 1903, 1 Ch. 659; 72 L. J. Ch. 373.

enjoyed with the same, or reputed or known as part, parcel, or member thereof.

“(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained (s).”

Conveyance of dominant tenement.
Conv. Act, 1881, s. 6.

“(5) This section shall not be construed as giving to any person a better title to any property, right, or thing, in this section mentioned, than the title which the conveyance gives to him, to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing, in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.”

By virtue of s. 2 of the same Act—

“Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses or other buildings, also an undivided share in land (t); conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance” (u).

S. 2.

As the result of these statutory provisions conveyances executed since 1881 may pass rights enjoyed with but not strictly appurtenant to the tenement conveyed. As to this doctrine, see the cases quoted post, p. 103.

If such a conveyance contains an express grant of “appurtenances” this may amount to a contrary intention so far as regards any right not strictly appurtenant (x). Where a school board having compulsory powers of purchase had given notice to treat for lands “with the appurtenances,” and the purchase-money had been ascertained in pursuance of the notice, the vendor was entitled to have inserted in his conveyance words excluding the operation of s. 6, except as to rights legally appurtenant to the land (y). Similarly, where the

(s) The mere description of land adjoining the house conveyed as “building land” does not show a contrary intention, so as to exclude the grantee’s right to light (*Broomfield v. Williams*, 1897, 1 Ch. 602; 66 L. J. Ch. 655; *Pollard v. Gare*, 1901, 1 Ch. 834; 70 L. J. Ch. 404).

(t) Sub-s. (ii.).

(u) Sub-s. (v.).

(x) *Birmingham Banking Co. v. Ross*, 1888, 38 Ch. D. 308; 57 L. J. Ch. 601; *Beddington v. Atlee*, 1887, 35 Ch. D. 331; 56 L. J. Ch. 655.

(y) *In re Peck and London School Board*, 1893, 2 Ch. 315; 62 L. J. Ch. 598.

Conveyance of dominant tenement.

Covenant for quiet enjoyment.

Severance of dominant tenement.

general words of the section would have passed a right of way not in the contemplation of the contract, words excluding the Act were inserted in the conveyance at the instance of the vendor (z).

A covenant for quiet enjoyment, whether express or implied, extends to an easement parcel of the demise (a). But it does not enlarge the grant, so as to confer an easement not within the grant (b); nor does a qualified covenant for title in a conveyance extend to an easement to which the grantor was not entitled (c).

If a severance of the dominant tenement takes place, all its easements which are attached to the tenement and not to the person of the owner will attach to the severed portions (d). It is obvious, however, that by such severance no right is acquired to impose an additional burden on the servient tenement (e). However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

Merlin (f) expresses his opinion that wherever the object of a servitude is, from its nature, capable of a division, it may be divided. A right, for example, of drawing water from a well, to the extent of fifty buckets a day, may be divided, if the house is capable of division; and, if the house is divided into two parts, there is nothing to prevent each of the divided parts (*chacune de ces deux maisons*) from having in this water drawing (*puisage*) a right equal or unequal according to the stipulations of the instrument of partition. So if a man is bound by a servitude not to raise his wall above a certain height, there is nothing to prevent his being liberated from this burden in

(z) *In re Hughes and Ashley*, 1900, 2 Ch. 595; 69 L. J. Ch. 741.

(a) *Pomfret v. Ricraft*, 1669, 1 Saund. 322; *Andrews v. Paradise*, 1725, 8 Mod. 319. Cf. *Child v. Stenning*, 1879, 11 Ch. D. 82; 48 L. J. Ch. 392.

(b) *Blatchford v. Plymouth*, 1837, 3 Bing. N. C. 691; 6 L. J. (N. S.) C. P. 217; 43 R. R. 765; *Potts v. Smith*, 1868, 6 Eq. 311; 38 L. J. Ch. 58; *Booth v. Alcock*, 1873, 8 Ch. 663; 42 L. J. Ch. 557; *Leech v. Schweder*, 1874, 9 Ch. 463; 43 L. J. Ch. 487. Cf. *Spoor v. Green*, 1874, L. R. 9 Exch. 99; 43 L. J. Ex. 57; *Anderson v. Oppenheimer*, 1880, 5 Q. B. D. 602; 49 L. J. Q. B. 708; *Sanderson v. Berwick-upon-Tweed*, 1884, 13 Q. B. D. 547; 53 L. J. Q. B. 559; *Robinson v. Kilvert*, 1889, 41 Ch. D. 88; 58 L. J. Ch. 392. Cf. *Harrison v. Muncaster*, 1891, 2 Q. B. 680; 61 L. J. Q. B. 102.

(c) *Thackeray v. Wood*, 1865, 6

B. & S. 766; 33 L. J. Q. B. 275.

(d) *Harris v. Drewe*, 1831, 2 B. & Ad. 164; 35 R. R. 527; 9 L. J. K. B. 200 (as to pews); *Codling v. Johnson*, 1829, 9 B. & C. 934; 33 R. R. 375; 8 L. J. K. B. 68; and *Newcomen v. Coulson*, 1877, 5 Ch. D. 141; 46 L. J. Ch. 459 (as to rights of way). Dist. *Midland R. Co. v. Gribble*, 1895, 2 Ch. D. 827; 64 L. J. Ch. 826, where the way was erected for the purpose of affording communication between the two tenements while in the same hands. And cf. as to commons; *Tyrringham's Case*, 1584, 4 Rep. 36 b; *Wyat Wild's Case*, 1610, 8 Rep. 78 b.

(e) *Bower v. Hill*, 1835, 2 Bing. N. C. 339; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630. Compare the Scottish case of *Menzies v. Macdonald*, 1856, 2 Jur. N. S. 575.

(f) *Répertoire de Jurisprudence*, tit. Servitude, p. 45; and see below, Part IV., Chap. 3.

part, and, consequently, no reason why it should not be considered divisible. Conveyance of dominant tenement.

The civil law distinctly recognized the doctrine, that the dominant tenement continues to enjoy its servitudes, notwithstanding a severance (*g*).

B. As to Rights not legally appurtenant to the Tenement conveyed.

Questions of difficulty arise where there has been a unity of ownership of the dominant and servient tenements, and where, consequently, all easements have been merged in the general rights of property. Passing of quasi-easements on severance of dominant and servient tenements.

Where the dominant and servient tenements are subsequently severed, the question whether these easements, usually referred to as quasi-easements (*gg*), pass on the severance is governed by the following rules :—

I. Where these quasi-easements are in their nature continuous and apparent (e.g., the right to light), they pass upon a severance of the tenements by implication of law without any words of new grant or conveyance. Indeed, properly speaking, such easements are not revived, but newly created by implied grant. And the same observation applies to easements commonly called “of necessity.” Quasi-easements continuous and apparent. Passing thereof on severance.
This subject is considered in Part II., Chap. 2.

II. As regards the cases where these quasi-easements are in their nature not continuous and apparent (e.g., an ordinary right of way), it is necessary to state separately—first, the decisions on documents executed before 1882; and secondly, the decisions on documents executed after 31st December, 1881, the date on which the Conv. Act, 1881, came into operation. Quasi-easements not continuous and apparent. Passing thereof on severance.

First, *as to the decisions on documents executed before 1882.*

In one of the most important of these decisions it was laid down that quasi-easements not continuous and apparent in their nature will not pass on a severance of the tenements, unless the owner uses language to show that he intended to create the easement *de novo* (*h*). Decisions on documents before 1882.

The above statement of law was assented to in *Worthington v.*

(*g*) Si stipulator decesserit pluribus heredibus relictis, singuli solidam viam petunt.—Dig. 8, 1, 17, de serv. See ib. 11.

Si prædium tuum mihi serviat, sive ego partis prædii tui dominus esse cœpero, sive tu mei, per partes servitus retinetur, licet ab initio per partes adquiri non poterat.—Dig. 8, 1, 8, de

serv.

(*gg*) See ante, p. 14.

(*h*) Per Bayley, B., in *Barlow v. Rhodes*, 1833, 1 C. & M. 448; 21 L. J. (N. S.) Ex. 91; 38 R. R. 653; cf. Bro. Abr., “Extinguishment,” pl. 15. But a right of way over a “visible road” may pass by implied grant (below, Chap. 4).

Passing (where severance) of quasi-easements not continuous and apparent. Decisions on documents before 1882.

Gimson (i). Again, in *Pearson v. Spencer (k)*, Blackburn, J., says : " We do not think that on a severance of two tenements, any right to use ways which, during the unity of ownership, has been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create a right *de novo*. We agree with what was said in *Worthington v. Gimson*, that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way."

General words, such as "appertaining, belonging," &c., have been held in numerous instances, both with regard to rights of common and way, to be insufficient to pass the right upon a severance of the tenements (*l*) ; but a conveyance containing the words "used, occupied, and enjoyed," has been held to be sufficient (*m*).

Indeed, these words are as much a description of the thing granted, as if the way had been set out by its termini ; in either case it would be a matter to be ascertained by parol evidence, what was comprised by the description (*n*).

Such few authorities as are inconsistent with the rule as above stated, in giving to the words "appertaining" and "belonging" the same extended meaning proper to the words "used and enjoyed," must now be held to be overruled or to rest on their own special facts (*o*).

(i) 1860, 2 E. & E. 618 ; 29 L. J. Q. B. 116 ; 119 R. R. 873.

(k) 1861, 1 B. & S. 571 ; 124 R. R. 656 ; in error, 3 B. & S. 761 ; 124 R. R. 667.

(l) *Baring v. Abingdon*, 1892, 2 Ch. 374, 389 ; 62 L. J. Ch. 105 ; see *Saundeys v. Oliff*, 1597, Moore, 467 ; *Whalley v. Tompson*, 1799, 1 Bos. & P. 371 ; 4 R. R. 826 ; *Clements v. Lambert*, 1808, 1 Taunt. 265 ; 9 R. R. 749 ; *Barlow v. Rhodes*, 1833, 1 C. & M. 439 ; 2 L. J. (N. S.) Ex. 91 ; 38 R. R. 653.

(m) *Bradshaw v. Eyre*, 1597, Cro. Eliz. 570 ; *Wordledg v. Kingswel*, 1598, ib. 794 ; *Grymes v. Peacock*, 1610, 1 Bulstrode, 17 ; *Koostra v. Lucas*, 1822, 5 B. & Ald. 830 ; 24 R. R. 575 ; *James v. Plant*, 1836, 4 A. & E. 749 ; 6 L. J. (N. S.) Ex. 260 ; 43 R. R. 465 ; *Kcy v. Neath Council*, 1905, 93 L. T. 507 ; affd. 95 L. T. 771 ; the cases decided under s. 6 of the Conv. Act, 1881, cited above, p. 84.

(n) Phillips and Amos on Evidence, 8th ed. 732 ; see *Hinchcliffe v. Lord Kinnoul*, 1838, 5 Bing. N. C. 25 ; 8

L. J. (N. S.) C. P. 185 ; 50 R. R. 579 ; *Baird v. Fortune*, 1861, 7 Jur. N. S. 926 ; 123 R. R. 942. It must be remembered that these words are by virtue of the 6th section of the Conv. Act, 1881, to be read into every conveyance executed since the Act (*ante*, p. 84).

(o) In Com. Dig. Chimin, D. 3, the word "&c." may perhaps be supposed to denote "used and enjoyed," as well as appertaining. In *Hill v. Grange*, 1556, 1 Plow. 170, there were expressions in the deed which excluded the proper interpretation. *Staple v. Heydon*, 1704, 6 Mod. 1, and *Morris v. Edgington*, 1810, 3 Taunt. 24 ; 12 R. R. 579, were in fact cases of ways of necessity ; see per Bayley, B., in *Barlow v. Rhodes*, 1833, 1 C. & M., p. 445 ; 2 L. J. (N. S.) Ex. 91 ; 38 R. R. 653 ; and per Denman, C.J., in *Plant v. James*, 1836, 5 B. & Ad. p. 791 ; S. C., 4 A. & E. 749 ; 6 L. J. (N. S.) Ex. 260 ; 43 R. R. 465. *Thomas v. Owen*, 1887, 20 Q. B. D. 225 ; 57 L. J. Q. B. 198, was a case of a "visible road" ; see per Lindley, L.J., in *Baring v. Abingdon*, 1892, 2 Ch. at p. 390 ; 62

In *Wardle v. Brocklehurst* (p) the Exchequer Chamber acted upon the cases in which it has been held that the words "used, occupied, and enjoyed" are sufficient.

In that case, A., owner of two farms, the Lower Beach Farm, situate on a natural stream, and the Red House Farm, not so situate, conveyed the Red House Farm to the defendant, and afterwards conveyed the Lower Beach Farm to the plaintiff. At the time of the conveyance of the Red House Farm to the defendant, there was an enjoyment and user in fact of water from the stream, by means of an artificial culvert passing from the stream at a point above Lower Beach Farm, through some land already belonging to the defendant, and then through Red House Farm, and from that culvert at the point where it crossed Red House Farm the water was conducted by a pipe to the farm buildings of Red House Farm, while the rest flowed away through the culvert down to some dye-works belonging to the defendant. The conveyance of Red House Farm to the defendant contained the words "with all waters and watercourses used, occupied, or enjoyed with the premises." The action was brought by the plaintiff, as owner of the Lower Beach Farm, for the abstraction by the defendant of water from the natural stream by means of the culvert; and it was attempted to distinguish the case from the authorities above referred to, on two grounds: first, on the ground that the user and enjoyment, prior to the conveyance to the defendant, being dependent, not merely on the acquiescence of the owner of Lower Beach Farm, but upon the assent of the owner of the land through which the culvert had to pass between the natural stream and Red House Farm, "a thing so subject to capricious interruption could not at law be the subject of a conveyance." Upon this point, Williams, J., in delivering the judgment of the Court, said that if the land between the brook and the Red House Farm had belonged to a third person, the conveyance to the defendant being by the owner both of Lower Beach Farm and of the Red House Farm would amount to a statement by him that, in as far as in him lay, he granted to the defendant the Red House Farm, together with the right to divert the water from the brook, depriving himself of any right to complain thereof in respect of being the proprietor of Lower Beach Farm, and that the effect was the same as a grant by the owner of the Lower Beach Farm of the right to divert the water. To perfect that right it would be necessary

Passing
(where
severance) of
quasi eas-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.
Wardle v.
Brocklehurst.

L. J. Ch. 105. In some cases, however, the word "appurtenances" may have a secondary meaning. (p) 1859, 1 E. & E. 1058; 29 L. J. Q. B. 145; 117 R. R. 576.

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.
Wardle v.
Brocklehurst.

to have a grant from the owner of the land between the brook and the Red House Farm; but it so happened that, in the particular case, the defendant himself was the owner of the intervening land. Therefore (q) the right, which existed only as an enjoyment before, was, by the conveyance, clothed with a legal character. The second point of distinction relied upon was that more water was taken from the stream by the culvert than was used for the Red House Farm, and that conveyance only passed so much as was necessary to be enjoyed and used for the Red House Farm (namely, that which passed from the culvert by the pipe to the farm buildings), whereas the defendant, who happened also to be the owner of the lands into which the rest of the water in the culvert passed after it left the Red House Farm, was enjoying the water for the use of works upon those other lands also. Upon this the judgment proceeds: "It seems at first a strong thing to say that, by buying the land through which the pipe passed, i.e., the Red House Farm, the defendant can get an enjoyment not only commensurate with the uses of the farm, but sufficient for his other works also. The answer, however, seems to be, that by purchasing the Red House Farm and the enjoyment of the watercourse going through it, he has acquired a right to the watercourse as it existed at the time of the conveyance to him. It is true the enjoyment was only by means of the pipe from the culvert, but he could not have enjoyed that without the existence and continuance of that culvert. The culvert was ancillary to the right. It is plain, as the right conveyed was to have the water enjoyed by the owners of the Red House Farm, and to have it in the way in which they enjoyed it, and as that way was by means of the flow through the culvert, the defendant was entitled to the continuance of that flow. The consequence is, that after it has passed Red House Farm, the defendant gets a very beneficial enjoyment of it below. But that result does not deprive him of the right to have the flow continued. If he were not entitled to such continuance, he would be obliged to put up some works to provide for the enjoyment of his right to the water. This the plaintiff is not entitled to call upon him to do" (r).

(q) See, as to the effect of the subsequent acquisition of title to land by a person who had made or received a grant of an easement affecting it, the judgment of Lord Wensleydale in *Rowbotham v. Wilson*, 1860, 8 H. L. C. 364; 30 L. J. Q. B. 49; and cf. *North British R. Co. v. Park Yard*, 1898, A. C. 643 (a Scotch case).

(r) It would appear from the authorities quoted in the next chapter that, even without the special words referring to watercourses used and enjoyed with the premises, the easement claimed would have passed to the defendant as "continuous and apparent." And the same remarks apply to *Key v. Neath Council*, 1905, 95 L. T. 771; and to

In *Tatton v. Hammersley* (s), the effect of the words "used and enjoyed" was held to be destroyed by an express reservation of the close over which the way was claimed, with the appurtenances; but it may be doubted whether the decision would now be upheld on this ground. It may, perhaps, be supported by the consideration that the way was claimed by grant under the Statute of Uses (t).

It was for some time debated whether a grant of easements "used and enjoyed" with the premises conveyed, passes only such privileges as have at some former time been used therewith as of right; or all conveniences in fact used therewith at the date of severance. In the former case it would be necessary to show in every case that the tenement granted had at some time been held separately from the tenement retained, with a legal right to the easement claimed in respect of it. It is now settled law that no such necessity exists.

But the cases upon this point are important as illustrating the difficult question, what amount and quality of user during the unity of possession constitute such a dependence of one tenement upon the other as will, under a grant of the dependent tenement with ways, &c., used and enjoyed therewith, ripen into an easement.

In all the cases decided before *Thomson v. Waterlow* (u), with the doubtful exception of *Kooystra v. Lucas* (x), such a previous severance and enjoyment as of right appears to have existed, though in none of them was the decision put upon that ground.

In *Kooystra v. Lucas* (x) the defendant had demised to the plaintiff two tenements, Nos. 69 and 70, Oxford Street, with a piece of ground immediately behind No. 70, which had once formed part of a yard known as Sprang's Dairy: and the lease included all ways, passages, &c., to the demised premises belonging or therewith or with any part thereof used and enjoyed. At the time of granting the lease, and for many years before, the whole of the yard (including the part now demised) had been in the possession of one person, who had used a gateway between Nos. 71 and 72 as a way for his horses and cattle to every part of the yard. The plaintiff built a coach-house and some stables upon the part demised, and claimed to use the gateway and a way over some part of the yard (y) as a means of

Passing (where severance) of quasi-easements not continuous and apparent. Decisions on documents before 1882.

Effect of an express reservation. Where grant of easements "used and enjoyed" previous enjoyment as of right need not be shown.

Early cases on the point.

Kooystra v. Lucas.

cases of continuous and apparent easements decided under the Conv. Act, 1881, s. 6

(s) 1849, 3 Exch. 279; 18 L. J. Ex. 162.

(t) See above, p. 77.

(u) 1868, 6 Eq. 36; 37 L. J. Ch. 495.

(x) 1822, 5 B. & Ad. 830; 24 R. R. 575.

(y) Kelly, C.B., in commenting on this case in his judgment in *Langley v. Hammond*, 1868, L. R. 3 Exch. at p. 169; 37 L. J. Ex. 118, does not refer to this latter claim, which appears from the statement of facts. So far as the judg-

Passing
(where
severance)
of quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

Kooystra
v. Lucas.

Thomson v.
Waterlow.

access to them ; and it was held that, by the terms of his lease, he was entitled to do so. It does not appear by the report whether the part demised had been held separately from the remainder of the yard, and with a legal right of way over it ; and, though it may fairly be inferred from the silence of the reporter that there was no evidence of any such severance, the case cannot be regarded as an express authority upon the point discussed in *Thomson v. Waterlow*. The report does not show how far the part demised had been used as dependent on the part retained, nor whether there was any defined or usual track between the gateway and the part demised. Neither does it appear whether there was any practicable approach to the plaintiff's stables except through the gateway.

In *Thomson v. Waterlow* (z) the owners of closes A and B had made a road leading from a common adjacent to close A, over close A to close B, and had used it for their personal convenience in the management of their property. Close B had been sold to the plaintiff, who was the owner of an estate lying beyond it, and had been conveyed to him with all ways, &c., therewith occupied or enjoyed ; close A had then been sold and conveyed to the defendant. The plaintiff claimed to use the road above referred to as appurtenant to close B. Lord Romilly, M.R., decided against this claim. "There is," he said, "it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the judges in *Plant v. James* (a) intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held the tenements, which convenience ceased to exist when the severance between the closes took place. My meaning will be better explained by an example : Suppose the proprietor of a large farmyard, contiguous to and opening on a high road, to possess six fields continuously adjoining each other in a line diverging from the high road, and that for the convenience of cultivating them the owner has been in the habit of carting manure from the farmyard on to the most distant close, and also of conveying the produce of

ment and the reporter's head-note are concerned, the case might simply relate to the question of the divisibility of easements, discussed above at p. 86.

(z) 1868, 6 Eq. 36 ; 37 L. J. Ch. 495.
(a) 1836, 5 B. & Ad. 791 ; 4 A. & E. 749 ; 6 L. J. (N. S.) Ex. 260 ; 43 R. R. 465.

this field through the other fields to the farmyard, and on to the high road. If, in that state of things, the proprietor should sell the most distant field to a gentleman who made it a part of his park, which was contiguous to it, and which was still more distant from the high road, does the case of *Plant v. James* mean to lay down that in such a case, if in the conveyance the vendor used the words which are contained in this deed, the purchaser of the field would thereby acquire a right of way from his park through the land of the vendor to the high road, and through his farmyard? I think nothing less than express words describing such a road would be sufficient for such a purpose. But the case would be very different if the owner of the park had always had a right of way from the park through the six closes to the high road, and had afterwards become the purchaser of those six fields and the farmyard, whereby the right of way had become merged by unity of possession, and if he had afterwards sold the park and the adjoining six fields to a purchaser, and in the conveyance conveyed to that purchaser 'all rights of way now or heretofore used, occupied, or enjoyed,' then these words would point expressly to the ways formerly used. In the case before me, there was no previous right of way to be merged; how then can unity of possession create in one case what it suspends in another case (b), and give to the purchaser of the outlying closes all the same modes of access over the rest of the adjoining property of the vendor which that vendor used before the sale? It is clear that it cannot, on behalf of the plaintiff, be put less high than this, for why should the purchaser be allowed to select one out of half-a-dozen ways which the vendor was habitually using? It is obvious, therefore, that if these words were held to create a new right of way, they would give the purchaser of the outlying field a right of going over the adjoining property of the Messrs. Fellowes in every direction in which they had been accustomed to go from or to the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the piece of land so sold. This evidently could not be the intention of the vendor. The question depends upon the construction of the deed; and it is clear that these words have only a natural meaning belonging to the circumstances of the case, and not a technical meaning extending to every road which the owner may have made for his own temporary convenience. I do not think the words have such a meaning by themselves. I do not think the

Passing
(where
severance) of
quasi easements not
continuous
and apparent.
Decisions on
documents
before 1882.
Thomas v.
Waterlow.

(b) It seems probable that there is some mistake here in the report. Obviously it is not the unity of possession

but the express grant accompanying the severance, which is said to create the right of access.

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

*Thomson v.
Waterlow.*

*Langley v.
Hammond.*

vendors used them in that sense. I think no case exists which compels me to give them a meaning contrary to that which, in the circumstances of the case, they will properly bear. The case, therefore, must depend upon this circumstance, whether there was a road used before the vendors held the property; in other words, whether it was an old road which became merged by the unity of their possession, or whether it was simply a road used for their own convenience in managing the property."

In *Langley v. Hammond* (c) the defendant was the owner of a house and pleasure-ground, and was the lessor of a farmyard, with some outbuildings erected upon it, which adjoined her pleasure-ground on the west. The entrance to the farmyard was in a street to the north; and from the entrance gate straight across the open yard and terminating at the opposite hedge on the south (in which there was no gateway or means of exit) was a hard gravelled roadway, used for carting the farm produce into the yard, and for the more convenient access to the buildings thereon, and not fenced in on either side. In 1866 the defendant, wishing to regain possession of that portion of the farmyard which immediately adjoined her pleasure-ground and lay between the boundary of her grounds and the roadway above mentioned, for the purpose of making a kitchen garden, took a surrender of this strip of land and the outbuildings upon it, "together with all ways . . . therewith now used, occupied, and enjoyed," and covenanted to make and keep in repair a boundary fence between the strip surrendered and the remainder of the farmyard. After the surrender the defendant claimed the right to have a gateway in the boundary fence, and to use the whole length of the roadway as an access to the strip surrendered. She had no other means of getting to this strip with a cart, unless she made a road through her pleasure-ground. At the trial the judge directed the verdict to be entered for the plaintiff; and a rule nisi, obtained by the defendant, to enter the verdict for her, was discharged by the Court of Exchequer.

Kelly, C.B., in giving judgment, said: "I do not enter into the question of how far this was a defined fixed road. Though it is spoken of as a hard gravelled road, it seems to have been more properly a track; but at any rate it was a way along which persons occasionally passed from West Street to the land containing the buildings. The question is this: there never having been a time, previously to the surrender of 1866, when the two pieces of ground

(c) 1868, L. R. 3 Exch. 161; 37 L. J. Ex. 118.

were owned and used by different persons, so as to make it possible for a right of way in a strict sense to exist, but the way having only been used for the accommodation and at the pleasure of the owner of both properties, was a right of way, upon the severance of the properties by the conveyance or surrender of 1866, created or passed by law by virtue of general words, which we may take as being the largest and most extensive that could have been used? I am of opinion that it was not. The law resulting from the numerous and complicated cases to which we have been referred is simply this: When the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction, if afterwards by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property on his own land. But if at a later period the properties again fall into the ownership and possession of different persons, and in the conveyance of the land to which the right of way was formerly attached, the words are found, 'together with all ways, &c., used or enjoyed therewith,' the effect of these words is to revive the right that formerly existed, and which has been, not extinguished, but only suspended. But since it does not appear here that at any antecedent time there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words cannot make or revive a right of way that never before existed. I need not examine the authorities at length; the effect of them may be correctly gathered from the judgment of the Master of the Rolls in *Thomson v. Waterlow*, which relieves me from the necessity of considering them in detail."

Martin, B., seems also to have considered himself bound by the judgment of the Master of the Rolls in *Thomson v. Waterlow* to decide the case on the same ground.

Bramwell, B., gave judgment as follows: "I also think this rule must be discharged. I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and possession. And should the case arise, I should wish for time to consider before I consented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house, I should wish for time to

Passing
(where
severance) of
quasi case-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.
*Langley v.
Hammond.*

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

Langley v.
Hammond.

consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is that there is here really no defined road. It is said that it is hard and gravelled, but in truth, as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the illustration) than the short cut a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way which he may use; but he only uses it equally with ways in other directions, by virtue of his right of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to. Another ground is this, that, assuming any way to exist, it would be merely a way up to the nearest part of the adjoining land; but the defendant claims to go through the whole piece to the extreme end. As these grounds are in my judgment sufficient, I will not entangle the case by a consideration of the other questions raised."

Watts v.
Kelson.

Watts v. Kelson (*d*), a case of watercourse, was decided on another point and without reference to the words of the grant of easements; but, in the course of the argument and of the judgment, the Lords Justices James and Mellish expressed their concurrence in the observations of Baron Bramwell in the above case of *Langley v. Hammond*.

Kay v. Oxley.

The point was well raised in *Kay v. Oxley* (*e*). The defendant had conveyed to the plaintiff a messuage, with a cottage and stable belonging to it, called "Roseville," "together with all . . . ways and rights of way . . . with the same or any of them now or heretofore demised, occupied, or enjoyed." A former tenant of Roseville had, by permission, built a loft over the cottage, with apertures opening on to a private farm-road passing over other land of the defendant; and he and his under-tenants had, up to the time of the sale to the plaintiff, used the defendant's farm-road to get hay and corn to the loft. It was held that the plaintiff was entitled to use the road for the same purposes.

"The first case," said Blackburn, J., "relied on for the defendant

(*d*) 1870, 6 Ch. 166; 40 L. J. Ch. 126.

(*e*) 1875, L. R. 10 Q. B. 360: 44 L. J. Q. B. 210.

is *Thomson v. Waterlow* (*f*), before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is reported to have said: 'There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties.' I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: 'I do not think that the judges in *James v. Plant* (*g*) intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place.' Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think, whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises—it was used for the convenience of the man who was the occupier of the two; and, when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And, though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to show that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision. In *Langley v. Hammond* (*h*) the Lord Chief Baron is reported to have laid it down as a matter of law: 'Since it does not appear here that at any antecedent time,' that is, before the unity of possession, 'there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words,' (together

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent
Decisions on
documents
before 1882.
Kay v. Okeley.

(*f*) 1868, 6 Eq. 36; 37 L. J. Ch. 465; 6 L. J. (N. S.) Ex. 260.
495.
(*h*) 1868, L. R. 3 Exch. 168; 37
(*g*) 1836, 4 A. & E. 749; 43 R. R. L. J. Ex. 118.

Passing
(where
severance)
of quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

Kay v. Oxley.

with all ways used or enjoyed therewith) 'cannot make or revive a right of way that never before existed.' And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson v. Waterlow*. No doubt the Lord Chief Baron so lays down the law; and, if that had been the decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of Error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my brother Lush suggested in the course of the argument, had been 'together with the right of way which Green (the under-tenant of Roseville) de facto has enjoyed of passing over the private farm-road,' supposing that had been a right of way never enjoyed as of right but merely a way de facto used, still, I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction; and, taking it in that way, which is the point Martin, B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's dictum, I do not think that what the Master of the Rolls said amounted to so much; but, if it did, we have the dicta of the Lords Justices James and Mellish in *Watts v. Kelson* (i), showing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only de facto used and enjoyed, or whether it was originally created before the unity of possession and then ceased to exist as a matter of right, so that in the one case it would be a right created de novo, in the other merely revived. But it makes a great difference as a matter of evidence on the question whether the way was used and enjoyed as appurtenant."

Other cases
on the
meaning of
easements
used and
enjoyed, &c.
Barkshire v.
Grubb.

The judgment of Lush, J., was to the same effect.

In *Barkshire v. Grubb* (k) the main question was raised in this

(i) 1870, 6 Ch. at pp. 172, 174; 40 L. J. Ch. 126.

(k) 1881, 18 Ch. D. 616; 50 L. J. Ch. 731.

way. Two brothers and two sisters, tenants in common in equal shares of a piece of ground which had never been divided, verbally agreed that the land should be partitioned as follows, viz., that one portion (coloured green on a plan afterwards prepared, and so referred to in the case as the green portion) should be conveyed to the elder brother, another portion (called the pink portion) to the second brother, and the remainder (called the blue portion) to the elder sister, the remaining sister receiving 50*l.* from the brothers for her share of the land. On the pink and blue portions stood a double cottage, or building divided into two cottages. This building stood to the east of a high road, from which it was separated by part of the pink land. The eastern cottage (the one farthest from the high road) stood on the blue portion; the western cottage stood on the pink portion. Access from the high road to both the cottages was obtained by a clearly defined gravel path, which had been constructed during the unity of possession, and passed over that part of the pink portion which separated the cottages from the high road. The deed of partition, executed in pursuance of the agreement above set out, was so drawn as not to divide the pink portion from the blue, but to make the younger brother and the elder sister tenants in common of both; but the brother took possession of the pink portion, and the sister of the blue. The brother having stopped up the path, an action was brought by the sister for partition of the pink and blue portions, or for rectification of the deed already executed.

Passing
(where
severance) of
quasi-easements not
continuous
and apparent.
Decisions on
documents
before 1882.
*Berkshire v.
Grubb.*

The action was heard by Fry, J., who held that the plaintiff was entitled to have the deed reformed, so as to give her, instead of an undivided moiety of the pink and blue land, the blue land in severalty, together with a right of way over the gravelled path for all purposes connected with the blue land, and ordered the brother to restore the path.

“In determining how the conveyance ought to be framed, the Court could not exclude from its consideration the fact that the gravelled path was actually used as a mode of access from the road to the cottages. Further, I must observe that from the evidence it appears that there was in fact at this time no other path leading from the high road to the cottages; and, upon the scheme of the agreement, there was no other which could well be used for access to the blue land, for that land was on all sides surrounded either by the pink or by the property of strangers. Therefore, in my opinion, the deed to carry into effect the agreement ought to have contained a grant of a right of way to the plaintiff over the

Judgment of
Fry, J.

Passing
(where
severance)
of quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

*Barkshire v.
Grubb.*

gravelled path. But I will go a little further, and will suppose that the deed executed in pursuance of the agreement, instead of expressly granting the way, had contained only the ordinary general words; would those words have passed this right of way? I think that among the general words would have been found a grant of 'all ways now used or enjoyed with' the blue land (*l*). Then the simple inquiry would have been, was the way in question, at the time of the execution of the deed, used or enjoyed with the blue land? If it was, it would have passed with the deed; if it was not, it would not have passed (*m*). I have already found upon the evidence that the way was used at the time with the blue land; and, therefore, in my opinion, it would have passed under those general words." The learned judge then reviewed the authorities, and said that the doubt, introduced by the cases of *Thomson v. Waterlow* (*n*) and *Langley v. Hammond* (*o*), whether the above words would be sufficient to pass ways never enjoyed as of right and over a separate property, was dispelled by the dicta in *Watts v. Kelson* (*p*) and the decision in *Kay v. Oxley* (*q*). After quoting the opinion expressed by Bramwell, B., in *Langley v. Hammond* (*r*), he continued: "I adopt that view: I think that, where there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

*Bayley v
G. W. R.*

The point arose once more in *Bayley v. G. W. R.* (*s*), and the law as laid down by Fry, J., in the above case was affirmed by the Court of Appeal. In this case, the Great Western Railway Company had purchased from the plaintiff, under the powers of their Act, a piece of land on which was a stable; and by the

(*l*) See, however, *Bolton v. Bolton*, 1879, 11 Ch. D. 968; 48 L. J. Ch. 467. Cf. *Nicholls v. Nicholls*, 1900, 81 L. T. 811.

(*m*) It is difficult to reconcile with the principles here stated the decision of Kindersley, V.-C., in *Daniel v. Anderson*, 31 L. J. Ch. 610; 8 Jur. N. S. 328. For, if the way there claimed was in fact used with No. 4, Mincing Lane, during the unity, and if the plaintiff was entitled to a grant of all ways used with the property, he was entitled as against his vendor to the way in ques-

tion. And, as the defendant presumably had notice of the plaintiff's rights (see *Fewster v. Turner*, 11 L. J. (N. S.) Ch., per Wigram, V.-C., at p. 163), the plaintiff had the same rights in equity as against him.

(*n*) 1868, 6 Eq. 36; 37 L. J. Ch. 495.
(*o*) 1868, L. R. 3 Exch. 161; 37 L. J. Ex. 118.

(*p*) 1870, 6 Ch. 166; 40 L. J. Ch. 166.
(*q*) 1875, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.

(*r*) Above, p. 94.

(*s*) 1884, 26 Ch. D. 434.

conveyance to the company the land was granted "together with all . . . rights, members, and appurtenances . . . deemed, taken or known, held, occupied or enjoyed as part, parcel, or member thereof." Access to the stable from the high road had always been obtained by means of a private road passing over other land of the plaintiff, and constructed during the unity of possession of such other land with the land conveyed; and this means of access had apparently been granted or permitted to a tenant of the plaintiff up to the date of the conveyance. It was held by Chitty, J., and by the Court of Appeal, that the company had, by virtue of the conveyance, the right to use this private road, although the conveyance affected to grant, not "ways" but "rights" enjoyed with the stable, and notwithstanding that the stable was purchased for the purpose of the defendants' undertaking. Chitty, J., said that, in this connection, the term "rights" must be used in some secondary sense, and as denoting something less than the legal right; and treated *Kay v. Ozeley* (t) and *Barkshire v. Grubb* (u) as settled law. The Lords Justices also treated this point as decided by those cases, and chiefly considered the distinction attempted to be made between a railway company taking land under compulsory powers and an individual (x).

Passing (where severance) of quasi-easements not continuous and apparent. Decisions on documents before 1882. *Bayley v. G. W. R.*

The result of the authorities is that, so far as the cases of *Thomson v. Waterlow* (y) and *Langley v. Hammond* (z) rested on the distinction between ways once enjoyed as of right and ways only enjoyed in fact, these cases may be taken to be overruled. The effect to be given to the words "used and enjoyed" is thus simply a question of construction (a), to be determined with due regard to the facts existing at the time of the conveyance (b).

Result of the cases.

In some cases, stress is apparently laid on the fact that the right is claimed over a "formed," "made," or "hard gravelled" road, i.e., a road physically and visibly marked out as such. No

Whether track need be visible.

(t) 1875, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.

(u) 1881, 18 Ch. D. 616; 50 L. J. Ch. 731.

(x) Certain observations made by Chitty, J., and by Bowen and Fry, L.J.J., lead to the conclusion that they might have held the way to have passed even without an express grant of ways or other rights. This point is considered in the next chapter.

(y) 1868, 6 Eq. 36; 37 L. J. Ch. 495.

(z) 1868, L. R. 3 Exch. 161; 37 L. J. Ex. 118.

(a) See per Bowen, L.J., in *Bayley v. G. W. R.*, 1884, 26 Ch. D. at p. 453;

and per Fry, L.J., ib. p. 456.

(b) *Hall v. Byron*, 1877, 4 Ch. D. 667; 46 L. J. Ch. 297: a case of common. And see *Roe v. Siddons*, 1888, 22 Q. B. D. 224, where it was held that a grant of land, with all ways "now or heretofore" held or enjoyed as appurtenant thereto, did not create a right of way over a road formerly used in connection with the land conveyed, but shut off from it by a stone wall twenty years before the conveyance. Cf. *May v. Belleville*, 1905, 2 Ch. 605; 74 L. J. Ch. 678. The word "heretofore" is not contained in s. 6 of the Conv. Act, 1881.

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
before 1882.

Whether
closes must
be divided.

Reference to
occupation.

*Martyr v.
Lawrence.*

doubt this marking out is of great importance as evidence of user; for, if the user be (as to support the grant it should be) a fixed and definite user, it is unlikely that no visible track should have remained. But the visibility is not itself an essential matter for the purpose now under discussion. The way to be proved is an incorporeal user, not a visible or bodily way, nor even an user evidenced by a "signe apparent" (c).

Neither is it essential that the close over which a way is claimed under these words should have been, before the severance, physically divided off and distinguished by buildings from the close in respect of which the way is claimed. They may have been both part of one undivided close. But here, again, such a physical division is of value as evidence of the dependence of one close upon the other, or of the user of one close as quasi-dominant over the other.

It should be added here that in some cases decided on documents before 1882 words other than "used and enjoyed" have been construed, or attempted to be construed, as a grant or reservation of an easement.

Among these is a reference to the mode of occupation of the premises.

In *Martyr v. Lawrence* (d), a shop, over which was a flat leaden roof, was demised to the plaintiff "as the same as was late in the occupation of Henry Corke." Henry Corke, the former lessee, had re-granted to the landlord, during his tenancy, the right to use the leaden roof; and this right was, at the date of the plaintiff's lease, let to another tenant, together with the adjoining cottage, which belonged to the same landlord. The defendant subsequently took this cottage from the landlord, with a right to use the roof of the shop.

It was held by Wood, V.-C., that the defendant had no right to use the roof against the plaintiff; and this decision was affirmed by Turner, L.J., who said that the words referring to Corke's occupation, being proper, if not necessary, for the purpose of identification, the insertion of them ought to be attributed to that purpose only. Where words in a deed or instrument are properly adapted to one purpose, they ought not, unless the effect of them be clear, or the construction of them be affected by the context or by surrounding circumstances, to be held applicable to another and a

(c) These observations do not, of course, apply to the case where a way is claimed, as an "apparent" easement, under a grant not referring to use and

occupation. This case is considered in the next chapter.

(d) 1864, 2 D. G. J. & S. 261; 2 Jur. N. S. 858: 139 R. R. 99.

different purpose. Knight Bruce, L.J., dissented, being of opinion that the words referred to ought to receive the full construction contended for by the defendant.

In the above case, the words referring to occupation were relied on as amounting to a reservation; in *Polden v. Bastard* (c) an attempt was made to construe them as a grant. There one Rachael Polden Bonnel died seised of two adjoining houses, one of which she occupied up to the time of her death. The other was in the occupation of one Answood, who had no supply of water on his own premises, and had been accustomed, with the permission of the common owner, to go on to her premises and draw water for the use of his house from a pump in her yard. R. P. Bonnel, by her will, devised the house in her own occupation to the plaintiff, and gave the other house, "as now in the occupation of Thomas Answood," to another person, who conveyed the house and all appurtenances to the defendant. In an action of trespass, for breaking and entering the plaintiff's close and carrying away water, the defendant pleaded an easement to do so, contending that the words above given amounted to an express devise of such an easement, and that in any case such an easement would pass either as apparent and continuous, or as being of necessity, without express words. The Court of Queen's Bench negatived both contentions; and the Exchequer Chamber (f) affirmed the decision, holding, as to the former, that the expression quoted could not be construed like the word "enjoyed," but was simply a specific description of the property devised. "I would add," said Erle, C.J., "with regard to the case of *Bodenham v. Pritchard* (g), that the devise was of a mansion, 'together with all the buildings and lands thereunto belonging, as now enjoyed by me'; but there are no such words in the present case. If the language of this will had been, 'I devise the house as now enjoyed by Answood,' then *Bodenham v. Pritchard* might be an authority for the defendant."

Passing (where severance) of quasi-easements not continuous and apparent. Decisions on documents before 1882. *Martyn v. Lawrence*. *Polden v. Bastard*.

Secondly, as to the decisions on documents executed since 1881.

In the case of these documents regard must be had to the sections of the Conv. Act, 1881, set out at length, ante, p. 84. From these provisions it will be seen that a grant of ways, &c., occupied or

Passing (where severance) of quasi-easements not continuous and apparent. Decisions on documents since 1881.

(c) 1863, 4 B. & S. 258; L. R. 1 Q. B. 156; 32 L. J. Q. B. 372; 35 L. J. Q. B. 92; 147 R. R. 396.

(f) Erle, C.J., Pollock, C.B., Willes, Byles, and Keating, JJ., Bramwell and Pigott, BB.

(g) 1823, 1 B. & C. 350; 1 L. J. K. B. 131; 25 R. R. 405. This was not the case of an easement enjoyed with the property devised, but rather a question of boundaries to property.

Passing
(where
severance) of
quasi-ease-
ments not
continuous
and apparent.
Decisions on
documents
since 1881.

*International
Stores v.
Hobbs.*

*Titchmarsh
v. Royston.*

enjoyed with the premises is *prima facie* deemed to be inserted in every conveyance after 1881. But the insertion is subject to the terms of the conveyance.

In *International Stores v. Hobbs* (*h*) it was held that, by virtue of the general words deemed to be inserted in a conveyance by s. 6 of the Conv. Act, 1881, the purchaser of property, occupied by him under lease, prior to, and at the time of the conveyance, was entitled to a right of way over adjoining property of his vendor, which right of way he had enjoyed during his occupation under the lease, although such enjoyment was had only by permission of the vendor.

In *Titchmarsh v. Royston* (*i*) a claim was put forward under the general words contained in the section to a right of way over a road running alongside of, but not having any means of communication with, property purchased from the plaintiff's lessor by the defendants. The case was decided adversely to the claim, so far as the point now under consideration is concerned, upon the ground that the road never was enjoyed with, or reputed to belong to, the defendants' property.

Passing
(where
severance)
of quasi-
easements.
Decisions
on docu-
ments since
1881.

*Beddington v.
Atlee.*

There is also a series of decisions on documents since 1881 which, inasmuch as they deal with quasi-easements continuous and apparent in their nature, should appropriately be inserted in Part II., Chap. 2. But as they have been treated by the Courts as depending on the Conv. Act, 1881, they are for convenience inserted here.

In *Beddington v. Atlee* (*k*) the owner of a house and a plot of land adjoining first granted a lease of the house, then contracted to sell the plot to the defendant, and afterwards contracted to sell the house, subject to the lease, to the plaintiff. These two contracts for sale were in fact carried into effect by conveyances in the order following, namely, the conveyance to the plaintiff was executed first and the conveyance to the defendant afterwards. The plaintiff subsequently determined the lease upon a breach of condition, and recovered possession of the house. Upon the defendant commencing to build on the adjoining land so as to obstruct the lights of the plaintiff's house, the plaintiff instituted proceedings, claiming an easement of light over the adjoining land, on the ground (*inter alia*) of an express grant, by virtue of the Conv. Act, 1881, s. 6. The conveyance of the house to the plaintiff contained the words "together with the ways, paths, passages, lights, rights, easements and appurtenances."

(*h*) 1903, 2 Ch. 165; 72 L. J. Ch. 543.
(*i*) 1900, 81 L. T. 673; 48 W. R. 201.

(*k*) 1887, 35 Ch. D. 317; 56 L. J. Ch. 655.

Chitty, J., in dealing with the question of the Conv. Act, said (l) : "Then the plaintiff says that, inasmuch as these lights were - - and he is quite right in point of fact—actually enjoyed at the time of the conveyance, therefore there is an express grant to him of the lights. No doubt these words do carry the plaintiff's case beyond what the law otherwise would have done (m), and far beyond what the deed itself does. Conveyancers had, previously to the passing of this Act, invented a form which carried not the appurtenances merely, such as are strictly so in law, but carried rights which were usually enjoyed at the time of the conveyance, the effect of which was, in many cases, to grant de novo a right. I am bound, then, to read into the conveyance the words of sect. 6, sub-s. 2, unless the 4th sub-section applies. The 4th sub-section runs thus : 'This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance, and to the provisions therein contained.' The question is, whether the deed, which mentions the appurtenances thereto belonging in such a form as to show that only appurtenances strictly so called would pass, is a sufficient expression of a contrary intention. . . . There is not an expression of a contrary intention in so many words. What there is in the deed is an expression that something shall pass, and something less than would pass under the Act, and the question is, whether the maxim *expressio unius est exclusio alterius* is strong enough to apply to such a case as is before me." The learned judge did not answer this question, deciding against the claim of the plaintiff, on the ground that, by reason of the prior contract for sale to the defendant of the adjoining plot, the common vendor was not in a position, at the date of the plaintiff's conveyance, to grant, either by express or implied grant, the right to light claimed by the plaintiff.

In *Birmingham Bank v. Ross* (n) the corporation of Birmingham granted a lease to the predecessor in title of the plaintiffs of a piece of land, and a building then recently erected thereon by the lessee under a building agreement, "with the rights, members and appurtenants to the said premises belonging." The building abutted on a passage twenty feet wide, which the corporation agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high. It was held that the plaintiffs had no right against the corporation, or against persons claiming under them, either under the general words in the lease or the grant implied

Passing
(where
severance) of
quasi-ease-
ments.
Decisions on
documents
since 1881.
Beddington
v. Atlee.

Birmingham
Bank v.
Ross.

(l) 35 Ch. D. at p. 331.

(n) 1888, 38 Ch. D. 295 ; 57 L. J. Ch.

(m) But see *Godwin v. Schweppes*, 601.
Ltd., cited below, p. 108.

Passing
(where
severance)
of quasi-
easements.
Decisions
on docu-
ments since
1881.

*Birmingham
Bank v. Ross.*

by the Conv. Act, to prevent the erection, on the site of the old buildings, of buildings eighty feet high which materially interfered with the light to the house leased to the plaintiff. Cotton, L.J., after referring to s. 6, sub-s. 2, of the Act, said (o): "But in my opinion, even with the assistance afforded us by the language of this deed, this could not be said to be a light, within the meaning of this section, enjoyed with the house. The house had only recently been erected, and at the time when this lease was granted it was obvious to both parties that this was a large tract of land bought by the corporation of Birmingham for the purpose of effecting an improvement, and for the purpose of the land being laid out so as to have buildings upon it, and at the time when the lease was granted, Corporation Street had only just been formed; and there was no plan of the buildings upon it, but it was the duty of the corporation, as of course it would be their interest, to lay this out in such a way as to make it available for recouping the expenses, and also to be an improvement to this portion of Birmingham. Therefore, I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at that time come over that building; but it came over it under such circumstances as to show that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period, and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean, not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious."

Query also whether, in that case, the express agreement to keep open the passage might not be construed as negating any further right to light, and therefore showing a "contrary intention" within the meaning of sub-s. 4 of the section.

*Broomfield v.
Williams.*

In *Broomfield v. Williams* (p) it was held that a description of land retained by a vendor as "building land" was insufficient to show a "contrary intention" within sub-s. 4 of s. 6 of the Act, and that the purchaser was, under sub-s. 2 of the section, *prima facie* entitled to all lights enjoyed with a recently-erected house sold to him, as those lights were enjoyed at the date of the conveyance, and that the burden of setting limits to the right lay on the vendor.

(o) 38 Ch. D. at p. 407.

(p) 1897, 1 Ch. 602; 66 L. J. Ch. 655.

In *Born v. Turner* (q) the section was referred to and treated as passing a right to light over land retained by the vendor, on a sale by him of the property in respect of which the right was claimed.

Passing
(where
severance)
of quasi-
easements.
Decisions
on docu-
ments since
1881.

In *Brazier v. Glasspool* (r) the defendant, in April, 1898, agreed with the plaintiff for the sale to him of a piece of land for the purpose of getting gravel with the right to use a tramway then about to be constructed for the purpose of hauling the plaintiff's gravel to a railway. In August, 1898, the defendant granted a lease of his property, including the site of the tramway, to a limited company, who agreed with the plaintiff for the haulage of his gravel over the tramway. In December, 1898, the defendant conveyed to the plaintiff the piece of land agreed to be sold to him in April, "with the appurtenances." It appears that at this date the tramway had been constructed and was being actually used, and on the plan to the plaintiff's conveyance it was shown and marked as a tramway. In August, 1900, the defendant acquired back the leasehold interest of the company, and subsequently disputed the plaintiff's right to use the tramway. It was held, upon these facts, that by virtue of s. 6 (1) of the Conv. Act, 1881, there was an express grant of the use of the tramway, as being a "right" within the terms of that sub-section; and the learned judge expressed his opinion that this right might have been exercised against the limited company, who took the lease with notice of the agreement between the plaintiff and the defendant.

Born v.
Turner.
Brazier v.
Glasspool.

In *Pollard v. Gare* (s) a landowner contracted to grant a lease of a vacant piece of land when a house of a specified character was built thereon, and, after the erection of the house, granted the lease retaining adjoining land; and it was held by Kekewich, J., that the lessee was entitled to an injunction restraining the owner of the adjoining land, who claimed under the lessor, from obstructing the access of light to the house. The learned judge dealt with the case in the first instance, under the doctrine that a grantor may not derogate from his grant, but added that it might also be treated as depending on the 6th section of the Conv. Act, 1881, and, following *Broomfield v. Williams* (t), held that the fact of the contract for the lease having been entered into by reference to a plan showing that the property, of which the land leased and the adjoining land retained formed part, was part of a building estate, did not denote a "contrary intention" under the section.

Pollard v.
Gare.

Burrows v. Lang (u) was a case in which the use and flow of an

Burrows v.
Lang.

(q) 1900, 2 Ch. 211; 69 L. J. Ch. 593.

(r) 1901, W. N. 237.

(s) 1901, 1 Ch. 834; 70 L. J. Ch. 404.

(t) Ubi sup.

(u) 1901, 2 Ch. 502; 70 L. J. Ch. 607.

Passing
(where
severance)
of quasi-
easements.
Decisions
on docu-
ments since
1881.

Burrows v.
Lang.

Godwin v.
Schweppes,
Ltd.

Quicke v.
Chapman.

artificial watercourse was claimed. Farwell, J., in considering the effect of the Conv. Act, 1881, referred to the passage from the judgment of Cotton, L.J., in *Birmingham Bank v. Ross* (x) above quoted, and, after considering the circumstances under which the grant of the property in respect of which the easement was claimed was made (which circumstances the learned judge held he ought to consider), held that the enjoyment of the watercourse was precarious, and that, in the circumstances, it could not have been the intention that the general words of the section should pass the right claimed.

In *Godwin v. Schweppes, Ltd.* (y), the grantee of a house with windows had notice of the intention, existing at the date of the grant, to erect on the adjoining land of the grantor buildings which would to some extent interfere with the access of light to such windows; and it was held that in those circumstances he was not entitled, by virtue of s. 6 of the Conv. Act, 1881, to an absolute and unlimited right to light.

The decision in *Quicke v. Chapman* (z), so far as the point now under consideration is concerned, was that a person having only a right, under a building agreement, to enter upon land adjoining property conveyed by him to a grantee, is not in a position to grant a right to light over such adjoining land, by a grant either contained in the deed or deemed to be inserted therein by s. 6 of the Conv. Act, 1881. The head note to the case, so far as concerns this point, is as follows: "The provision of s. 6, sub-s. 2, of the Conveyancing Act, 1881, that a conveyance of land with houses on it shall operate to convey with the land (inter alia) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, and does not operate to convey an easement of light which he has no power to grant expressly." In that case the facts were that the defendant, under a building agreement, was entitled to enter upon a piece of land and erect a certain number of houses thereon, and upon the completion of each house to have granted to him a lease thereof for ninety-nine years. Having completed one of the houses (No. 28), he took up the lease, and assigned it to the plaintiffs. he subsequently entered upon the adjoining plot of land (No. 30), and erected thereon a house which interfered with the access of light to the plaintiff's said house, and it was held that, for the reasons given above, he could not be prevented from doing so.

(x) Ubi sup.

(y) 1902, 1 Ch. 926; 71 L. J. Ch. 438.

(z) 1903, 1 Ch. 659; 72 L. J. Ch. 373.

CHAPTER II.

ON THE ACQUISITION OF EASEMENTS BY IMPLIED GRANT.

THE implication of the grant of an easement may arise upon the severance of an heritage by its owner into two or more parts. Again, the acquisition of easements by prescription may be classified under the head of implied grant; for according to the common law all prescription presupposes a grant (*a*). But this mode of acquisition will be dealt with in a subsequent chapter. There is a third class of cases where such a grant is inferred on account of acquiescence, but these have been considered ante, p. 66.

Implication
of a grant

SECT. 1.—*Disposition of the Owner of Two Tenements.*

On the grant by the owner of a tenement of part of that tenement, a grant will be implied of (1) all those continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted, and which have been, and are at the time of the grant, used by the owner of the entirety for the benefit of that part (*b*); and (2) of all those easements without which the enjoyment of the part granted could not be had at all.

Grant
implied on
severance of
tenements.

The latter class are usually termed easements of necessity. The former class are usually termed “quasi-easements” (*c*). And the mode of acquiring them it is proposed to call Disposition of the owner of two tenements—which phrase is adopted as expressing the same origin of title as that which is designated by the French law “*Destination du père de famille*,” with the incidents to which, as defined by the Code Civil, the English law upon this subject appears to agree.

“By the ‘*destination du père de famille*’ is understood the disposition or arrangement which the proprietor of several heritages (*fonds*) has made for their respective use. Sometimes one heritage receives a benefit from another, without being in return subjected to an inconvenience which could amount to a species of compensation; sometimes this service is reciprocal: but these

*Destination
du père de
famille.*

(*a*) *Gardner v. Hodgson's Co.*, 1903, Ch. D. 49; 48 L. J. Ch. 853.
A. C. 239; 72 L. J. Ch. 558.

(*b*) *Wheeldon v. Burrows*, 1879, 12 (c) As to the meaning of quasi-easements see ante, p. 14.

Grant implied on severance of tenements.

Derogating from the grant.

differences do not in any way change the nature or effect of this distribution. If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other, which was simple 'destination du père de famille,' as long as the heritage belonged to the same owner, becomes a servitude as soon as they pass into the hands of the different proprietors" (d).

Cases of this nature, which have come under the consideration of our Courts, have generally been treated as arising from the application of the rule, that "no man can derogate from his own grant" (e). This rule, however, seems to be more directly applicable to some of these cases, viz., those where there is no "apparent sign of servitude," but, unless the easement be presumed, the grantor would in fact derogate from his own grant; e.g., where a grant has been implied from the abutments given in a conveyance (f), or

(d) Pardessus, *Traité des Servitudes*, s. 228. See the judgment of Lord Westbury, *Suffield v. Brown*, 1864, 4 D. G. J. & S. 195; 33 L. J. Ch. 249; 146 R. R. 267.

(e) See *Browne v. Flower*, 1911, 1 Ch. 224; 80 L. J. Ch. 181; *Cable v. Bryant*, 1908, 1 Ch. 264; 77 L. J. Ch. 78.

(f) In *Roberts v. Karr*, 1809, 1 Taunt. 495; 10 R. R. 592, Pratt had released to Compigné land of unequal width, described as abutting east on a new road on Pratt's own soil. It abutted in the widest part on the road; but in the narrower part a strip of the grantor's land (which he alleged that he had intended to reserve) intervened between the road and the premises granted. It was held that, even admitting that Pratt had intended to reserve the land, yet he and those claiming under him were concluded by the description in Compigné's release from preventing Compigné or his assigns from coming out into the road over the strip of land. "Is it not," asked Lord Mansfield, C.J., "a sufficient answer to say, 'You have told me in your lease, This land abuts on the road; you cannot now be allowed to say that the land on which it abuts is not the road'?"

In *Harding v. Wilson*, 1823, 2 B. & C. 96; 3 D. & R. 287; 1 L. J. K. B. 238; 26 R. R. 287, a lease of premises to one Bolton described them as abutting on "an intended way of 30 feet wide," the soil on that side of the premises demised being the property of one Sloane, the lessor. The defendant, as tenant of the adjoining land under a subsequent

demise from Sloane, afterwards built to within 27 feet of the land demised to Bolton. The plaintiff, an underlessee from Bolton, having brought his action claiming a right of way over the whole 30 feet, it was admitted that he was entitled (independently, as it seems, of the description) to a convenient way, his premises not being otherwise accessible from the high road; but it was held that he was not entitled to more. "Adverting," said Abbott, C.J., "to the lease from Sloane to Bolton, the former does not grant a way 30 feet wide, but only described the land demised as bounded by an intended way of that width. There is merely an expression and declaration of intention." The argument was somewhat complicated by the fact that the plaintiff's underlease did not specify any particular width; but this was held to be immaterial. This case does not seem to have received very much consideration.

In *Espley v. Wilkes*, 1872, L. R. 7 Exch. 298; 41 L. J. Ex. 241, the defendant's lease described the premises demised as "bounded on the east and north by newly-made streets," and the new streets were shown on the plan endorsed. The lessee covenanted to kerb the causeways adjoining the land demised. The way to the east was never made or marked out, and the site was subsequently leased by the same landlord to the plaintiff. It was held that the effect of the defendant's lease was to give him a private right of way over both streets; for the lessor was by

from the description of the grantee (*g*) or the purpose of the grant (*h*).

Derogating
from the
grant.

his own description estopped from denying that there were streets which were in fact ways. Kelly, C.B., relied on *Harding v. Wilson* as an authority for the defendant, apparently treating that decision, so far as it affirmed the plaintiff's right to a convenient way, as proceeding on estoppel. But it is difficult to understand why, if the lessor in that case was estopped from denying that the plaintiff was entitled to some way, he was not equally estopped from denying that the way should be 30 feet wide. It is conceived that the "convenient way" in *Harding v. Wilson* was a way necessary.

The above cases were referred to by Cave and A. L. Smith, J.J., in *Roe v. Siddons*, 1880, 22 Q. B. D. 224; but the decision ultimately turned on another point. See also *Cooke v. Ingram*, 1893, 68 L. T. 671.

In *Mellor v. Walmesley*, 1905, 2 Ch. 164; 74 L. J. Ch. 475, it was held that, in a conveyance in which the land granted was described as bounded "on the west by the seashore," the word "seashore" meant "foreshore" in its strict legal sense, i.e., the land situate between medium high and low water marks; but that (applying *Roberts v. Karr*, sup.) the grantor was estopped or precluded from asserting that the land to the west of the plot was not seashore, and the grantee was entitled to unrestricted access to the sea from the western boundary of his property. See also *International Stores v. Hobbs*, 1903, 2 Ch. 165, 173; 72 L. J. Ch. 543. In *Rudd v. Bowles*, 1912, 2 Ch. 60, the grant of a right of way over a strip of land was implied under the circumstances of the case, including the manner in which such strip had been marked on a plan on the lease in question.

In an American case, *Lennig v. Ocean City Association* (41 N. J. Eq. 606), the defendants, a religious camp-meeting association, had mapped out their property in lots, reserving certain lots as a "camp-ground" for religious meetings, and had sold to the plaintiff by this map other lots fronting on the lots so reserved; it was held that the defendants could not let the reserved lots for building purposes.

(*g*) See *Herz v. Union Bank*, 1859, 2 Giff. 686; 128 R. R. 230, where the lessee was described as a diamond mer-

chant; *Hall v. Land*, 1863, 1 H. & C. 676; 32 L. J. Ex. 113; 130 R. R. 725 (quoted below, p. 122), where he was described as a bleacher. Compare *Cornbett v. Jonas*, 1892, 3 Ch. 137; 62 L. J. Ch. 43.

(*h*) In *Robinson v. Grave*, 1873, 21 W. R. 223; 27 L. T. N. S. 648, Wickens, V.-C., said: "It seems to me, upon general principles, that a grant made expressly for the purpose of the grantee's building a house creates a legal easement over the adjoining land retained by the grantor, to such an extent as may be strictly necessary for enabling the grantee to build the house and enjoy it when built; and, when the grant does not notice the intention of building, but both grantor and grantee knew that the purpose was building, an equitable right is obtained co-extensive with the legal right which would have been obtained if the grant had noticed the intention of building." In this case the houses were built between contract and conveyance. Cf. *Siddons v. Short*, 1877, 2 Q. P. D. 572; 46 L. J. Q. P. 795, where land was sold for an iron-foundry, and the grantee was held entitled to support, and *Aldin v. Latimer*, 1894, 2 Ch. 437; 63 L. J. Ch. 601, where a grantee, having covenanted to carry on a timber trade, was held entitled to the access of air to his timber-sheds.

In *Frederick Betts v. Pickfords*, 1906, 2 Ch. 87; 75 L. J. Ch. 483, lessees, under a lease which contained a covenant to build a warehouse according to approved plans, which showed certain windows, were held entitled by implied grant, as against the lessors, to an unqualified right to light to those windows; and the lessors having connected a building of their own, erected on adjoining land, with the warehouse, and the lessees having, on that account, been called upon, under the provisions of the London Building Act, 1894, to block up the windows in question, the lessors were ordered to disconnect their building from the warehouse.

The principle of the maxim that a grantor may not derogate from his grant has been extended so as to render a lessor liable, at the suit of his lessee, for damages caused by acts of nuisance committed by the lessor on adjoining property, for the consequences of which acts he would not, or might not, have

Qualified
necessity.

Mr. Willes, a former editor of this treatise, explained the decisions in question by the theory of what he called "qualified necessity." The easement, he said, although not absolutely necessary (as in the case of a land-locked tenement), is "necessary for the use of the tenement in the state it is in when severed," necessary, that is, "for the enjoyment of it in all its parts." This explanation of the doctrine of implied grant has the advantage of accounting naturally for the cases on ways noted in the following sub-section. It was explicitly stated by the Court in the case of *Ewart v. Cochrane* (4 Macqueen, H. L. C. 117), and it has been accepted by the judges in some of the later cases, as by the Master of the Rolls in *Suffield v. Brown* (i) and by Thesiger, L.J., in *Wheeldon v. Burrows* (k).

It is proposed, first, to deal with the implication of a grant of quasi-easements which are undoubtedly both continuous and

been liable, had the relationship of lessor and lessee not existed (*Grosvenor v. Hamilton*, 1894, 2 Q. B. 836; 63 L. J. Q. B. 661).

In *Williams v. Jersey*, 1841, 1 Cr. & Ph. 91; 10 L. J. Ch. 149; 54 R. R. 219, a somewhat similar point was raised, but not determined.

The limits of the doctrine are shown in *Popplewell v. Hodgkinson*, 1869, L. R. 4 Exch. 248; 38 L. J. Ex. 126; and *Robinson v. Kilvert*, 1889, 41 Ch. D. 88; 58 L. J. Ch. 392, where the grantor had no notice at the date of the grant that the grantee's trade of a paper merchant would be interfered with by an ordinary and reasonable use of the adjoining property.

The implication of a grant is subject to the terms of the instrument and to the circumstances under which it is executed. See below, p. 131.

The doctrine laid down in these cases applies equally where the conveyance of the property requiring the easement is taken by a public body, as by a railway or canal company, under its compulsory powers (*Caledonian R. v. Sprot*, 2 Macqueen, 449; *Same v. Belhaven*, 3 Macqueen, 56; *Eliot v. N. E. R.*, 1863, 10 H. L. C. 333; 33 L. J. Ch. 402; 138 R. R. 179; *Serff v. Acton*, 1886, 31 Ch. D. 679; 55 L. J. Ch. 569; *North British R. v. Turners, Ltd.*, 1905, 6 F. 900 (Ct. of Sess.)).

And, where an Act of Parliament empowers a public body, without taking a conveyance, to carry a sewer through private property, making compensation for damage, the Legislature means to give to the public body all rights with-

out which the power would be unavailable, including a right at least to vertical support (*Midland R. v. Checkley*, 1867, 4 Eq. 19; 36 L. J. Ch. 380; *Benfieldside v. Consett*, 1877, 3 Ex. D. 54; 47 L. J. Ex. 491; *In re Dudley*, 1881, 8 Q. B. D. 86; 51 L. J. Q. B. 121; *Normanton v. Pope*, 1883, 52 L. J. Q. B. 629; *L. & N. W. R. Co. v. Evans*, 1893, 1 Ch. 16; 62 L. J. Ch. 1; *Glamorgan-shire v. Nixon*, 1901, 85 L. T. 53; *Clippens v. Edinburgh*, 1904, A. C. 64; 73 L. J. P. C. 32; cf. *Jury v. Barnsley*, 1907, 2 Ch. 600; 76 L. J. Ch. 593). See the Waterworks Clauses Act, 1847, ss. 18 to 27, and the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883; and below, Part III., Chap. 4. In *Metropolitan Board v. Metropolitan R.*, 1869, L. R. 4 C. P. 192; 38 L. J. C. P. 172, the decision was against the claim to lateral support; but there the sewer could have been constructed without the support claimed, and no right to compensation was given to the person from whom the support was claimed (5 Ch. D. 332; 1893, 1 Ch. 29, 33).

In some cases the Legislature has made the right to support conditional on the performance by the public body of a duty, as the repair of the banks of a canal (*Staffordshire v. Hallen*, 1827, 6 B. & C. 317; 5 L. J. K. B. 154; 30 R. R. 333); or the deposit of plans (*South Staffordshire v. Mason*, 1886, 56 L. J. Q. B. 255).

(i) 1863, 9 Jur. N. S. at p. 1001; 33 L. J. Ch. 249.

(k) 1879, 12 Ch. D. at p. 49; 48 L. J. Ch. 853.

apparent ; secondly, to consider how far a right of way comes within the rule ; and thirdly, to ascertain whether the doctrine operates in favour of the grantor as well as of the grantee.

(a) *Implied Grant of Quasi-easements which are continuous and apparent.*

An easement is a quality superadded to the usual rights, and as it were passing the ordinary bounds of property ; and with the exception of those easements, the enjoyment of which depends upon an actual interference of man at each time of enjoyment, as of a right of way (*l*), it is attended with a permanent alteration of the two heritages affected by it, showing that one is benefited and the other burdened by the easement in question. This permanent quality affecting the two heritages is sometimes fixed by nature itself, as in the case of water, "which holds its natural course," and, as it is observed by *Brudenell* in 12 Hen. 8, "naturâ suâ descendit" (*m*) ; sometimes it is artificially fixed, as by the erection of a roof or the placing of a gutter throwing the rain water on the neighbour's land.

Implied grant (where severance) of quasi-easements which are continuous and apparent. General remarks.

To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement, in the manner appointed by law, is necessary ; but where the land benefited and the land burdened belong to the same owner, he may change the qualities of the several parts at his will, and his express volition evidenced by his acts must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from long-continued acquiescence.

It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement ; for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property. But he has not the less thereby permanently altered the quality of the two parts of his heritage ; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, and in their nature permanent changes in the disposition of the property so that one part thereby becomes dependent upon another, that a purchaser should take the land with the qualities which the previous owner had undoubtedly the right to attach to it.

(*l*) As to which, see the next subsection.

(*m*) *Sury v. Pigott*, 1625, Popham, 169, per Whitlocke, C.J.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

This reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent,—or, in technical language, to those easements only which are apparent and continuous; understanding by apparent signs not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*n*).

The cases in which it has been held that easements of this nature are not extinguished by unity of ownership, unless the party has availed himself of his right of property to destroy the external mark of the easement, as by cutting a spout or removing the eaves of a house, are authorities in support of this doctrine.

The easement as such can in no case exist during the unity of ownership; and, if the owner might at any moment determine the easement by altering the relative disposition of the parts of his tenement inter se, what difference can it make whether he has suffered things to continue as they were previous to the union, or whether he has made one portion of his estate subject to the convenience of another by some express act done during the union? In either case he has acted by virtue of his general rights of property.

Unless it can be said that it makes a difference, that in the one case previous to the union a valid easement had been constituted, it is difficult to see on what ground any distinction can be contended for between the cases; but in a case on the subject, the authority of which has been frequently recognized, it is clear that no such right existed before the union, and that what was in fact a wrongful act—a nuisance—before the union, ceased to be so during the union and upon a subsequent separation became clothed with a legal title (*o*).

(1) Modern
rule
as to passing
(on sever-
ance) of
quasi-case-
ments which
are con-
tinuous and
apparent.

The modern rule on this subject has been stated by Parker, J., as follows: Where the owner of land grants or demises part of it, retaining the remainder in his own hands, such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case rebutting the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed

(*n*) Accidental non-user at the time of the severance, as in the instance of a drain not running by reason of the house not being then occupied, appears immaterial.

(*o*) *Robins v. Barnes*, 1616, Hobart, 131; post, p. 117; cf., on a similar point, *Kay v. Oxley*, 1875, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.

at the time of the grant or demise by the property granted or demised over the property retained (*p*).

The decisions in which this doctrine has been developed are set out in chronological order in pages 115 to 123.

The earliest case which is repeatedly cited, and upon which great reliance is placed in subsequent cases, was decided in the 11 Hen. 7 ; and although an attempt was made in argument in some of the later cases to distinguish it as a case of custom, the authority attached to it by the judges shows that they did not consider its applicability as at all restricted on that ground :—

One William Coppy brought an action on the case against J. de B., and counted that according to the custom of London, where there were two tenements adjoining, and one had a gutter running over the tenement of the other, the other cannot stop it, though it be on his own land ; and counted how he had a tenement and the defendant another tenement adjoining. The defendant's counsel said : “ We say that since the time of memory one A. was seised of both tenements, and enfeoffed the plaintiff of the one and defendant of the other.” To which it was replied : “ This is not a good plea, for the defendant seeks to defeat the custom by reason of an unity of possession since the time of memory ; and that he cannot do in this case, for such a custom, that one shall have a gutter running in another man's land is a custom solemnly binding the land, and this is not extinct by unity of possession ; as if the lord of a seign'ory purchase lands held in gavelkind, the custom is not thereby extinguished, but both his sons shall inherit the lands, for the custom solemnly bindeth the lands.” *Townshend* said : “ If a man purchase land of which he hath the rent, the rent is gone by the unity of possession, because a man cannot have rent from himself ; but if a man hath a tenement from which a gutter runneth into the tenement of another, even though he purchase the other tenement, the gutter remains, and is as necessary as it was before.” To this it was objected by the defendant's counsel : “ That he who was the owner of the two tenements might have destroyed the gutter ; and that if he had done so, and then made several feoffments of the two tenements, the gutter could not have revived.” To which it was replied : “ If that were so, you might have pleaded such destruction specially, and it would have raised a good issue ” (11 Hen. 7, 25, pl. 6).

The case of warren, relied upon as illustrating the argument of

Implied grant (where coverage) of quasi-easements which are continuous and apparent. Older decisions.

Coppy v. J. de B., 11 Hen. 7.

Case of warren.

(*p*) *Browne v. Flower*, 1911, 1 Ch. 225 ; 80 L. J. Ch. 181.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

the existence of an easement notwithstanding the unity, is as follows, 35 Hen. 6, 55, pl. 1 :—

An action of trespass was brought for hunting in the plaintiff's warren and carrying away his hares and rabbits. The defendant pleaded in abatement, that the place where, &c., was the manor of D., in which manor the plaintiff had nothing, except as joint tenant with two others. On demurrer, judgment of respondeat ouster was given. The objection to the plea was that, although the plaintiff was but a joint tenant of the land, he might still be sole owner of the warren ; and that, as it did not appear by the plea whether he was so or not, and a plea in abatement to be good must be “ bon a cescun comon entent,” the plea was bad. A man, it is there said, may have warren either by grant of the king in his own land, or by prescription in the lands of another. Common and rent are not like a warren, for if one have a certain rent issuing out of land, and he purchase the land, the rent is gone ; and the same law of a common, for a man cannot pay rent to himself or have common on his own land ; but one may have warren either in the land of another man or his own, for it is not issuing out of the land, neither is it payable ; but it is, as has been said, realty and privilege in the land, and nothing else.

A free warren, being a franchise, which (like that of forest, chase and the like) subsists as a distinct and separate inheritance at the same time with the ownership of the land over which it extends in those cases where it happens to belong to the owner of that land, does not furnish any analogy. Positive easements, authorizing acts on the land of another, which the ordinary right of property enables a man to do on his own land, necessarily merge when the land upon which they are exercisable becomes vested in their owner ; but the franchise of free warren confers privileges, the right to which could not be claimed on a man's land by virtue of his ownership of the land, and which are wholly unconnected with that ownership.

*Nicholas v.
Chamberlain.*

In *Nicholas v. Chamberlain* (*q*), which was an action of trespass, “ it was held by all the Court upon demurrer that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house (*r*), the conduit and pipes pass with the house ; because it is necessary and quasi-appendant

(*q*) 1607, Cro. Jac. 121.

(*r*) As to the second case, see below, sub-sect. (c).

thereunto : and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one and the land to another, the vendee shall have the conduit and the pipes and liberty to amend them. But, by *Popham*, if the lessee erects such a conduit, and afterwards the lessor, during the lease, sells the house to one, and the land, wherein the conduit is, to another, after the lease determines he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation or usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking consuance of any such erection or using it, but presently after his re-entry sells the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit ; but in the principal case, by reason of the misleading therein, there was not any judgment given.”

Implied grant (where severance) of quasi-easements which are continuous and apparent.

The case of *Robins v. Barnes* (s) is thus reported in Rolle : “ If A. is seised in fee of a house which hath certain windows by prescription, and B. hath another house close adjoining to that, and B. tortiously erects a structure on his own frank tenement, which overhangs the house of A. and thereby stops his light, and afterwards B. purchase in fee the house of A., and afterwards grant by lease to C. the house which was the house of A. ; C. has no remedy to abate this nuisance, for by the unity of possession the prescription for the windows was extinct ; being that C. ought to take that in such plight as it was at the time of the grant made to him, *for the unity purges the tort*, both being in the hand of one person, who might deal with it at his pleasure.”

Robins v. Barnes.

“ So it is if B. afterwards pull down his house and rebuild it in the same manner as it was before, so that he does not make it overhang more than it did at the time of the grant to C. ; but if he causes it to overhang more than before, an action lies for C. to have this remedied, for it is a new tort.”

In the report in Hobart the Court agreed : “ That though one of the houses had been built overhanging the other wrongfully

(s) 1616, Roll. Abr., tit. Extinguishment, D. 936, pl. 7 ; S. C., Hobart, 131 ; Vin. Abr. Extinguishment, D., pl. 7.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.
*Robins v.
Barnes.*

*Sury v.
Pigott.*

before they came into one hand, yet after, when they came both into the hand of Allen, that wrong was now purged, so that *if the houses came afterwards into several hands, yet neither party could complain of a wrong before.*" It is to be observed that in this case the action was brought not only for disturbing the easement of ancient light, but also for an infringement of the common law rights of property, by making a roof overhanging the plaintiff's soil; and the decision was not only an authority for the position that the abstinence of the owner of the united tenements from removing the obstruction to the windows was an extinguishment of the prescriptive right to the light, but also that by his permitting the overhanging roof to continue, and severing the tenements in that condition, the encroachment of the overhanging roof, though tortious at the time the tenements first became his property, was legalized.

In *Sury v. Pigott (t)* an action was brought for obstructing a stream of water running over the defendant's land to a pool of the plaintiff's, situate in a close which was part of the plaintiff's rectory. The defendant pleaded that the land over which the water ran, and the plaintiff's close, were both part and parcel of the manor of Markham, and that King Henry VIII., being seised of the said manor in his demesne as of fee, granted the land over which the water ran to one under whom the defendant claimed; and the question was, whether the unity of ownership in the king had extinguished the easement. For the plaintiff it was argued that the easement was not extinct because it was a thing of necessity, and though a rent and a way may be extinguished by unity, the easement had a separate and distinct existence; and it was likened to the case of warren, or a right to drive beasts to pasture in a forest, which rights are not extinguished by unity. So also of a gutter, which, like a watercourse, has a separate existence. On the other side it was argued that it was extinct by unity, because it was a charge on the soil of another, as a right of way or enclosure, both of which have been held to be extinguished by unity; and although the custom of gavelkind is not extinguished by purchase of the seignior, yet it is otherwise of a prescription, which follows the estate in the land and the person.

It was resolved by the whole Court that the watercourse was not extinguished, but Dodderidge, J., said: "That a way, if it were of convenience (*voy de ease*), is extinguished, but not a way of

(t) 1625, Palmer, 444; S. C., Pop- ham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145. This is not, properly speaking, a case of ease-

ment, but one of natural right (above, p. 6); but the judges' dicta relate to easements.

necessity." And so it was the opinion of Popham, C.J., in the Lady Brown's case: "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct because he thereby declares his intention and purpose that he does not wish to enjoy them together, viz., the watercourse and the land." Dodderidge, J., argued that a fence should be extinguished by unity, because it is not of necessity, and put this case: "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it." Whitlocke, C.J. (*u*), said: "A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by consent of parties nor by prescription, but ex jure naturæ, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own land; and in the case 11 H. 7, the gutter was not extinguished only by the unity of possession, but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived."

Implied grant (where necessary) of quiet enjoyment which are continuous and apparent. *Sarg v. Pigott*.

In *Cox v. Matthews* (*x*), which was an action for stopping lights, an exception was taken to the declaration, because it did not state the plaintiff's house to be ancient. *Hale* said: "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house; for ejus est solum ejus est usque ad cœlum, and this holds unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build a house on his own ground, and then grant the house to A., and grant certain land adjoining to B., B. could not build to the stopping of its lights in that case."

Cox v. Matthews.

In *Palmer v. Fletcher* (*y*), which was an action on the case for stopping lights, it appeared that a man erected a house on his own land, and afterwards sold the house to one and the land adjoining to another, who obstructed the lights of the house: and it was resolved "that though it was a new passage, yet no person who claimed the land by purchase, under the builder, could obstruct the

Palmer v. Fletcher.

(*u*) Popham, 170.

(*x*) 1684, 1 Ventris, 237, 239; S. C., 3 Keble, 133, as to a point of pleading only.

(*y*) 1675, 1 Levinz, 122; 1 Siderfin, 167, 227, nom. *Palmer v. Flessers*; 1 Keble, 553, 625, 794, nom. *Palmer v. Flessier*.

Implied grant (where severance) of quasi-easements which are continuous and apparent.

Palmer v. Fletcher.

lights any more than the builder himself could, who could not derogate from his own grant, for the windows were a necessary and essential part of the house." Kelynge, J., said, suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. Twysden, J., to the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees, and cited a case to be so adjudged; but all agreed that a stranger, having lands adjoining to a messuage, newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise, if the messuage be ancient, so that he has gained a right to the lights by prescription. And, afterwards, a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.

Peyton v. London.

In *Peyton v. London* (z), which was an action for withdrawing support by pulling down an adjoining house, the declaration contained no allegation of any right to support, or of any fact from which that right might be inferred in law; it therefore was unnecessary to decide what the result would have been had the two houses originally belonged to the same owner. Lord Tenterden, in delivering judgment, alludes to such a state of facts, apparently inclining to favour the existence of such a right, if there had been at some former time a unity of the ownership of the two houses. And the judgment of the Court of Exchequer in *Richards v. Rose* (a) is an authority to show that upon the severance of ownership of two or more houses, obviously and necessarily requiring mutual support, there is, by an implied grant or reservation, as the case may be, the right to support; and that such "right equally subsists, whether the owner parts first with one and then with the other, or with the two together, the last being afterwards divided." This case was treated by the Court as one of absolute necessity.

Canham v. Fiske.

In *Canham v. Fiske* (b) the plaintiff purchased a garden, through which ran a stream of water, from a person who was also the

(z) 1829, 9 B. & C. 736; 7 L. J. K. B. 322; 33 R. R. 311.

(a) 1853, 9 Exch. 220; 23 L. J. Ex. 3; 96 R. R. 675. See, in support of this case, the observations of Lord Westbury in *Suffield v. Brown*, 1864, 4 D. J. & S. 198; 33 L. J. Ch. 249; 146 R. R. 267; and those of Thesiger, L.J.,

in *Wheeldon v. Burrows*, 1879, 12 Ch. D. 59; 48 L. J. Ch. 853; and see below, Part III., Chap. 4, sect. 3.

(b) 1831, 2 C. & J. 126; 1 L. J. (N. S.) Ex. 61; 37 R. R. 655; preface, viii. The right in this case appears to have been an ordinary right of property, and not an easement.

owner of an adjoining field, in which the spring supplying the stream took its rise; the defendant, having bought the field, diverted the stream, after the plaintiff had used the water for about nineteen years. At the trial, the learned judge was of opinion that as, at the time of the plaintiff's purchase, the two closes were the property of the same owner, the unity of ownership destroyed the prescriptive right, and consequently nonsuited the plaintiff. The Court of Exchequer granted a new trial. Lord Lyndhurst observed: "The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land. If the conveyance had been produced, and had been silent as to the water, still the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance merely because the conveyance was not produced?" And Bayley, B., added: "If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house I sell the easement. The land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time."

Implied grant (where severance) of quasi-easements which are continuous and apparent.
Cannham v. Fiske.

In *Blanchard v. Bridges* (c) the rule was again cited. But there the windows in question had been altered after the date of the conveyance from which the implication of a grant arose; and the Court said that the implication must have reference to the state of things at the time of the conveyance. The question of the effect upon a grant of light of an alteration of the windows had not then been fully considered (d).

Blanchard v. Bridges.

In *Ewart v. Cochrane* (e) the respondent claimed the right to send the refuse of his tan-yard through a drain into a cesspool in the appellant's garden. Both tenements had belonged to one Murray, who had conveyed the tan-yard to the respondent's predecessor, "and that as the whole said subjects are previously possessed by us," but without alluding to the drain; he afterwards conveyed the garden to the appellant, who stopped the drain. The House of Lords decided in favour of the respondent.

Ewart v. Cochrane.

The observations made in this case by Lord Campbell, L.J., would carry the law a good deal further than it has yet been carried. "I consider the law of Scotland," he said, "as well as the law of England, to be that, when two properties are possessed by the

(c) 1835, 4 A. & E. 176; 5 L. J. (N. S.) K. B. 78; 53 R. R. 208.

(d) See below, Part V., Chap. 2.

(e) 1861, 7 Jur. N. S. 925; 4 Macqueen, S. A. 117; 123 R. R. 938.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

Ewart v.
Cochrane.

same owner, and there has been a severance made of part from the other, anything which was held and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words in the conveyance. I do not know whether the usual words are essentially necessary; but where there are the usual words, I cannot doubt that that is the law." The reference to "comfortable enjoyment" appears to set up a somewhat vague test of the qualified necessity (*f*); and Lord Campbell's observations, as reported, make no distinction between continuous and apparent easements, which will pass without words of grant, and other conveniences (such as "non-apparent" ways), which will not pass without a grant of ways, &c., "used and enjoyed" with the premises. Lord Chelmsford treated the easement as absolutely necessary for the enjoyment of the tan-yard.

Hall v. Lund.

In *Hall v. Lund* (*g*) the owner of two mills had leased one to the defendant. In the lease he was described as a bleacher, and the premises leased as lately occupied by Pullan. Pullan had formerly carried on the business of a bleacher in this mill, and had drained his refuse into a watercourse which supplied the other mill. The lessor afterwards sold the mills to the plaintiff, who sued the defendant for polluting the watercourse with the drainage from his bleaching works to the injury of the other mill. The action failed, on the ground that the defendant's lease contained an implied grant of the right to use the watercourse for carrying on the business of a bleacher; and, on a rule obtained, the Court upheld the verdict. Three of the judges (*h*) considered the easement claimed by the defendant to be apparent and continuous within the principle of the above cases; and, independently of this, they considered that, the lessor having demised the premises for the purpose of bleaching, neither he nor those claiming under him could derogate from his grant (*i*). The remaining judge (*k*) based his concurrence on the dictum in *Ewart v. Cochrane*, which is commented on above.

It should be noted that in both these cases the right claimed was, not merely to use water, but to pollute it.

(*f*) Above, p. 112.

(*g*) 1863, 1 H. & C. 676; 32 L. J. Ex. 113; 130 R. R. 725.

(*h*) Pollock, C.B., Channell, B., and Wilde, B.

(*i*) This decision has been recently discussed in H. L., where (apart from the doctrine of continuous and apparent easements) Lord Parker classifies implied grants of easements as being

(1) where the right is necessary for the enjoyment of some other right expressly granted, or (2) where the right is necessary to give effect to the common intention as to the purpose for which land is to be used. *Pwllbach v. Woodman*, 1915, A. C. 646; 84 L. J. K. B. 874. See above, pp. 110, 111.

(*k*) Martin, B.

In *Davies v. Marshall* (l) the plaintiff's lease contained an express grant of "ancient lights"; but this was held not to negative the implied grant of the new lights.

Implied grant (where severance) of quasi-easements which are continuous and apparent.
Davies v. Marshall.
Polden v. Bastard.

In *Polden v. Bastard* (m), a case relating to a non-continuous easement, Erle, C.J., said: "There is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction; and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but, with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass."

In *Watts v. Kelson* (n) the owner of two closes, having made an artificial watercourse for the supply of cattle-sheds, conveyed first the cattle-sheds to the plaintiff (o), and afterwards the close through which the watercourse ran to the defendant. It was held, on appeal from Romilly, M.R., that the plaintiff was entitled to have the enjoyment of the watercourse in the same manner as it was enjoyed during the unity of possession. Mellish, L.J., delivered the judgment of the Court; and, after citing the judgment in *Polden v. Bastard* (p), above referred to, continued: "We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement, extending to the dominant tenement, by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement." He referred to *Nicholas v. Chamberlain* (q) and *Wardle v. Brocklehurst* (r).

Watts v. Kelson.

Since the decision in *Watts v. Kelson*, the principle of the implied grant of continuous and apparent easements in a case where the quasi-dominant tenement is first conveyed away, has been treated as settled law (s); and the Courts have been occupied mainly

Other cases.

(l) 1861, 1 Dr. & Sm. 557; 31 L. J. C. P. 61; 7 Jur. N. S. 720, 1247; 9 W. R. 368, 866; 4 L. T. N. S. 105, 581; 127 R. R. 208. Cf. *Brown v. Alabaster*, 1887, 37 Ch. D. 490; 57 L. J. Ch. 255; *Thomas v. Owen*, 1887, 20 Q. B. D. 225; 57 L. J. Q. B. 198.

(m) 1863, 4 B. & S. 258; L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; above, p. 103.

(n) 1870, 6 Ch. 166; 40 L. J. Ch. 126.

(o) The conveyance granted water-courses used and enjoyed with the tene-

ment conveyed, but the decision did not turn on this.

(p) 1863, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92.

(q) Above, p. 116.

(r) Above, p. 89.

(s) See, e.g., *Robinson v. Grave*, 1873, 21 W. R. 223; 27 L. T. N. S. 648 (where the lights were opened between contract and conveyance); *Bayley v. G. W. R.*, 1884, 26 Ch. D. 434 (per Chitty, J., at p. 438); *Myers v. Catterson*, 1889, 43 Ch. D. 470; 59 L. J. Ch.

Implied grant (where severance) of quasi-easements which are continuous and apparent.
 (2) Rule applies notwithstanding that quasi-dominant or quasi-servient tenement is in lease.
Coutts v. Gorham.

with the subsidiary questions now to be mentioned, or with the doctrine of implied reservation treated in a later section.

It seems that, in the absence of any special circumstances, the rule holds notwithstanding that the quasi-dominant or the quasi-servient tenement is in lease at the date of the grant. The implied grant cannot, of course, operate for or against the lessee, but it takes effect immediately on the determination of his interest.

In *Coutts v. Gorham* (t), which was an action for obstructing lights, it appeared that one Hall was the owner of two adjoining houses, each of which had certain ancient windows. In 1800 he made a lease of one of these houses for twenty-one years, determinable on lives, of which lease the defendant was assignee; and in November, 1809, the defendant took a new lease of the same house for twenty-one years. The windows of the other house had been altered and placed in a different situation at a period (as it appeared) within twenty years before the obstruction complained of; but the jury found the alteration to have taken place previous to the lease to the plaintiff, which was granted in May, 1809. Tindal, C.J., said: "If the windows were in existence at the time of the lease to the plaintiff, he is entitled to recover. Hall, who executed the lease when the windows were there, could not himself obstruct

315 (where the vendors were a railway company); *Bailey v. Icke*, 1891, 64 L. T. 789; *Fred Betts v. Pickfords*, 1906, 2 Ch. 87; 75 L. J. Ch. 483 (where the building was contemplated but not erected at the date of the conveyance); *Phillips v. Low*, 1892, 1 Ch. 47; 61 L. J. Ch. 44 (a case of devise); *Corbett v. Jonas*, 1892, 3 Ch. 137; 62 L. J. Ch. 43 (where a claim by implied grant to an extraordinary amount of light was negatived); *Key v. Neath Council*, 1905, 93 L. T. 507; affd. 95 L. T. 771 (where the implication of a grant was assisted by general words in the conveyance). The rule applies although there is land intervening between the house sold and the land retained (*Birmingham Bank v. Ross*, 1883, 38 Ch. D. 295; 57 L. J. Ch. 601); and although the vendor is only equitably entitled to the land (*Beddington v. Atlee*, 1887, 35 Ch. D. at p. 322; 56 L. J. Ch. 655). But a merely equitable grant may be defeated by a legal conveyance of the servient property to a purchaser for value without notice (*Princep v. Belgravia*, 1896, W. N., p. 39). The rule was held not to apply where the vendor of the dominant

tenement had contracted to sell the servient tenement before the sale of the house (*Beddington v. Atlee*, 1887, 35 Ch. D. 328; 56 L. J. Ch. 655; see *Davies v. Thomas*, 1899, W. N. 244), or where the vendor of the dominant tenement had no right in the servient tenement except a builder's right to enter and have a lease (*Quicke v. Chapman*, 1903, 1 Ch. 659; 72 L. J. Ch. 373).

The rule was discussed in the following cases, where the decision turned on s. 6 of the Conv. Act, 1881 (see ante, pp. 84, 106), viz.:—*Broomfield v. Williams*, 1897, 1 Ch. 602; 66 L. J. Ch. 305 (where a grant of light was implied although the land retained was described on the plan as "building land"); *Pollard v. Gare*, 1901, 1 Ch. 834; 70 L. J. Ch. 404 (where the land was described by reference to a plan in which the estate was marked out in building plots); *Burrows v. Lang*, 1901, 2 Ch. 502; 70 L. J. Ch. 607 (where the rule was held not to apply to a watercourse constructed for a special temporary purpose).

(t) 1829, Moo. & Mal. 396.

them afterwards; and if so, he could not convey to any other possessor a right to do so.”—“It is true that the defendant had an existing term at the time, and his interest in that term would not be affected by Hall’s lease; but he surrendered that term by operation of law when he accepted a new lease from Hall.”—“The defendant’s new lease was derived out of Hall’s reversion; and Hall’s reversion was subject to the right already granted by him to the plaintiff. Assuming, then, that the windows were made within twenty years, but before the lease made to Coutts, Gorham’s present interest is derived from the same lessor at a subsequent period, and is therefore subject to the rights which Coutts already had against his lessor, and consequently, to that of his having the windows in question free from any obstruction” (u).

Implied grant (where severance) of quasi-easements which are continuous and apparent
Coutts v. Gorham.

To the same effect is *Davies v. Marshall* (x), where the quasi-servient tenement was in lease at the date of the conveyance of the quasi-dominant tenement; but the tenant of the former, having afterwards surrendered his lease, and taken a new one, was restrained from obstructing the windows of the latter.

Davies v. Marshall.

In *Barnes v. Loach* (y), where the quasi-dominant property was let at the date of the severance, Cockburn, C.J., and Lopes, J., declined to hold that this excluded the principle of the disposition of the owner.

Barnes v. Loach.

The rule also applies where, the quasi-dominant tenement and the quasi-servient tenement having been both included in a mortgage, the mortgagee bonâ fide sells the quasi-dominant tenement under his statutory power of sale (z). In such a case the mortgagee is, in effect, agent for the mortgagor for the purpose of the maxim that a grantor may not derogate from his grant.

(3) Rule applies where quasi-dominant and quasi-servient tenements are in one mortgage, and mortgagee sells quasi-dominant tenement.

In the next place, it has been decided that the general rule holds good even where the quasi-dominant and quasi-servient tenements are sold or conveyed at one and the same time.

The first case which bears upon this question is *Compton v.*

(4) Rule applies where quasi-dominant and quasi-servient tenements are conveyed simultaneously.
Compton v. Richards.

(u) But compare *Thomas v. Owen*, 1887, 20 Q. B. D. 225, on the reasoning in which a reservation by Hall might have been implied, out of the lease to Coutts, of the rights already granted to Gorham, not only for the term which Gorham had under his lease of 1800, but for the whole of the term granted to Coutts by the lease of May, 1809.

(x) 1861, 1 Dr. & Sm. 557; 7 Jur. N. S. 720, 1247; 9 W. R. 368, 866; 4

L. T. N. S. 105, 581; 127 R. R. 208. Cf. *Cable v. Bryant*, 1908, 1 Ch. 259; 77 L. J. Ch. 78.

(y) 1879, 4 Q. B. D. 494; 48 L. J. Q. B. 756. In *Wheaton v. Maple & Co.*, 1893, 3 Ch. 48; 62 L. J. Ch. 963, it does not appear that the plaintiff claimed by implied grant.

(z) *Born v. Turner*, 1900, 2 Ch. 211; 69 L. J. Ch. 593.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

Richards (a), which differs from any of the authorities already cited by reason of the easement, for the disturbance of which the action was brought, not being in existence at the time of executing the instrument under which the right was held to arise.

The house in question was one of a range of buildings, called the Royal York Crescent, at Clifton. The Crescent had been commenced in 1791, but, in consequence of the failure of the original owner, passed into various hands, and a part, comprising the houses of the plaintiff and defendant, was put up for auction in 1810. Both houses were sold: the defendant purchased No. 14; the plaintiff, in 1812, took a lease of No. 13 from the party who purchased it at the sale. By one of the conditions of sale, the buildings, according to a plan of the Crescent produced at the sale, were to be completed within two years from that time, which period had elapsed previous to the granting the lease of No. 13 to the plaintiff. After the expiration of the two years the defendant erected an additional room at the back of his house, one side of the room being formed by elevating the wall which separated the gardens of Nos. 13 and 14, the effect of which was to diminish the quantity of light previously admitted through the plaintiff's windows. It appeared that, at the time of the sale, although the houses were unfinished, yet the spaces intended for the windows in question were actually opened in the walls: the plan produced at the sale showed the situation and number of the windows intended for each house. There was no stipulation as to the height to which the garden walls might be raised; but other buildings, in the same direction, were expressly limited to the height of twenty feet. At the trial, before Graham, B., the learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict. A rule having been obtained, which the Court made absolute, it was argued in support of it that the rights of both parties were clearly pointed out at the time of the sale by the common vendor, which was admitted by Thompson, C.B., to be tantamount to an express agreement that such rights should not be obstructed. The spaces too, it was further argued, intended for the windows, being actually opened, the purchaser was fully aware what he was going to buy, as the exterior sufficiently exhibited to him what he would be entitled to enjoy.

Thompson, C.B., in delivering judgment, said: "This purchase must be taken to have been subject to certain conditions at the

(a) 1814, 1 Price, 27; 15 R. R. 682.

time of sale, and as these unfinished houses were at that time so far built as that the openings, which were intended to be supplied with windows, were sufficiently visible as they then stood, we must recognize an implied condition, that nothing would afterwards be done by which those windows might be obstructed; and the purchasers must have taken subject to what then appeared. The case of *Palmer v. Fletcher* (b) is strong and clear, and has been often quoted; and the effect of that case is that where a man sells a house he shall not afterwards be permitted to disturb the rights which appertain to it; and the windows of this house, being opened at the time, necessarily imported their non-obstruction. . . . It is sufficient for the purpose of maintaining this action if the erection of any building on the wall be the doing of an act whereby the plaintiff has sustained a derogation of any right which he acquired by his purchase. If so, it is what the original owner could not have done; and all lessees claiming under him are equally bound by the transfer."

Implied grant (where severance) of quasi-easements which are continuous and apparent.

Wood, B., said: "I consider Dr. Compton claiming here a right by grant, and when this house was granted to Auriol (the plaintiff's lessor) he became grantee of everything necessary to its enjoyment, as much as if it had been said at the time, that no one should obstruct the light which it then enjoyed."

In *Swansborough v. Coventry* (c) the plaintiff and defendant purchased adjoining tenements from the same vendor and at the same auction. The lot purchased by the plaintiff contained an ancient dwelling-house, with windows in every floor, looking into the property purchased by the defendant; the windows on the first and upper floors had never been interrupted, but those on the ground floor had for a long time been obstructed by a one-story building on the defendant's lot, which was pulled down shortly before the sale. The plaintiff's tenement was conveyed to him as bounded on the east by a piece of ground, described in the particulars of sale as a piece of freehold building ground constituting lot 11 at the aforesaid sale, purchased by the defendant. The defendant having obstructed the plaintiff's windows, the plaintiff obtained damages as to the windows above the ground floor; and, on a rule being obtained, the Court of Common Pleas affirmed this decision.

Swansborough v. Coventry.

"It is well established by the decided cases," said Tindal, C.J.,

(b) 1675, 1 Levinz, 122; above, 362; 2 L. J. (N. S.) C. P. 11; 35 R. R. p. 120.

(c) 1832, 9 Bing. 305; 2 Moo. & Sc.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

“ that, where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. . . . And, in the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties come within the application of this general rule of law.”

Of course, if there had been nothing special in the case, the general rule would have operated to protect the ground floor windows also ; for the defendant's land was vacant at the date of the sale. But the Court thought that the description in the plaintiff's conveyance of the adjoining property as “ building ground ” showed that the implied grant was intended to be in some manner qualified ; and, as there had been a building on the ground in question, established for a very long period of time and but recently demolished, which extended only to the height of the first floor of the plaintiff's house, they held that this gave the limit and extent intended by the terms in the description, “ so as at once to satisfy those terms, and at the same time to prevent the vendor from frustrating his own grant ” (*d*).

Allen v.
Taylor.

Again, in *Allen v. Taylor* (*e*), one Edward Allen, being seised of a piece of land with two dwelling-houses thereon, and also of an adjoining piece of land, devised his real estate to three trustees (including his two sons) upon trust for sale, giving his two sons an option of purchasing, either together or separately, any part of his real estate at a valuation. Both sons exercised the option, one of them taking a conveyance of the houses, with all lights, &c., the other, by a contemporaneous conveyance, taking the adjoining land. It was held by Jessel, M.R., that the purchaser of the land was not entitled to block up the windows of the houses.

“ There can be no doubt,” said he, “ that the law, as laid down by *Palmer v. Fletcher* (*f*), is the law of the present day ; that is, that, where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. . . . I take it also that it is equally settled law that, if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the

(*d*) This latter point is referred to below, p. 131.

(*e*) 1880, 16 Ch. D. 355 ; 50 L. J. Ch.

178.

(*f*) 1675, 1 Levinz, 122 ; above, p. 120.

windows of the house (*g*). Then there comes a third case. Supposing the owner of the land and the house sells the house and land at the same moment. And supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights, —the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyance? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of the transaction he takes the land; he cannot take away the lights from the house.” His Lordship proceeded to quote *Swansborough v. Corentry* (*h*), *Compton v. Richards* (*i*), and *Wheeldon v. Burrows* (*k*), and concluded by remarking upon the circumstance that, in this case, both the purchasers were also vendors (*l*).

Implied grant (where severance) of quasi-easements which are continuous and apparent.

In *Fewster v. Turner* (*m*) the question was raised before conveyance. There, property belonging to the defendant had been put up for sale in several lots, lot 1 being the Acorn Inn; and the plan circulated at the auction showed a well on lot 4, a reservoir connected with the well on lot 2, and a leaden pipe conveying water from the reservoir to the kitchen of the inn on lot 1. The plaintiff became the purchaser of the inn, and, after lot 4 had been conveyed away to another purchaser without any express reservation to the owner of lot 1 of the right of water from the well, claimed specific performance of his purchase, with compensation for the loss of the water. Wigram, V.-C., held that he had no right to compensation.

Fewster v. Turner.

“Where the sale plan accurately represents the property, which in this case it does, can the sale plan carry the case further than a view of the property itself would? I am only, therefore, called upon to assume that which the plaintiff has clearly a right to have assumed, that the property was advertised to be sold to him as it stood at the time. The question is, then, assuming the plaintiff went to the property and viewed it, and saw the pipe, &c., would he in that case be entitled to the reservation he claims? . . . All the vendor undertook was to sell the property, but with notice that the rest of the property would no longer remain in his hands. Suppose this altogether a natural flow of water. A person then

(*g*) See sub-s. (*c*), *post*.

(*h*) 1832, 9 Bing. 305; 2 L. J. (N. S.) C. P. 11; 35 R. R. 660; above, p. 27.

(*i*) 1814, 1 Price, 27; 15 R. R. 682; above, p. 126.

(*k*) 1879, 12 Ch. D. 59; 48 L. J. Ch.

853, per Thesiger, L.J.

(*l*) Cf. Cotton, L.J., in *Russell v. Watts*, 1883, 25 Ch. D. 573; and per Fry, L.J., 584; 55 L. J. Ch. 158.

(*m*) 1842, 11 L. J. Ch. 161; 6 Jur. 144; 59 R. R. 607.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

agrees to sell property, and sells it with the running water there, but makes no stipulation that he will enter into a covenant that the other purchasers shall not disturb the natural flow of the water. The plaintiff, purchasing the property with such natural flow of water, is left to assert his right against the other purchasers, if the flow of water is an easement to the property (*n*). How does the case differ if it is an artificial stream? The vendor says, 'I sell you the property as it is; other persons will hold one part, and you the other': the plaintiff must be left to assert his right against the other purchasers. It is not for the vendor himself to take any other precaution than that of conveying to the purchaser that which he contracts to sell. I have less hesitation in coming to this conclusion because, if the effect of the contract really is to give the plaintiff the right he claims, the other purchasers who have purchased on the footing of the sale plan will have purchased with notice of the plaintiff's contract, and are as much liable to the purchaser as the vendor himself, if he had remained owner of the other lots; for, in point of fact, they all purchased upon the same footing, and with full notice of the stipulations."

With regard to this case, it should be noted that the Vice-Chancellor did not decide that the plaintiff was not entitled to the easement which he desired to have. On the contrary, it would seem to have been his opinion that the plaintiff was entitled to such an easement as against the vendor; and that the purchaser of lot 4, although he had obtained his conveyance without any legal reservation to the vendor or to the plaintiff, had notice of the plaintiff's rights and would be bound in equity. The plaintiff, therefore, on taking his conveyance, would have an equitable right to the easement in question, and had no claim to compensation (*o*).

Russell v.
Harford.

In *Russell v. Harford* (*p*) the defendant had sold two properties at the same auction. Property A was bought by the plaintiff, the tenant in possession; property B by one Mackrell, the tenant of that property. During the unity of ownership, property B had been supplied with water by means of a pipe communicating with a well on property A. The defendant claimed to insert, in

(*n*) Or rather if the natural right to the flow of water is not restricted by an easement attached to the adjoining property; see below, Part III., Chap. I.

(*o*) The Vice-Chancellor did indeed express an opinion that it would be extravagant to suppose that, when the vendor sold the property, he intended

that the purchaser of lot 1 should have power to enter upon the other property and pump water for himself. But this opinion appears to be difficult to reconcile with some early cases, or with the course of the judgment in *Polden v. Bastard* (above, p. 123).

(*p*) 1866, 2 Eq. 507.

the conveyance of property A to the plaintiff, an express reservation of the flow of water through this pipe and the right to enter and repair it; relying on a condition of sale, which provided that each lot was sold subject to all rights of way and water and other easements subsisting thereon. The defendant's contention was negatived by *Kindersley, V.-C.*, who was of opinion that the condition referred, not to any rights which were to subsist between the purchasers of the several lots, but to rights belonging to third persons. He might perhaps have added that the reservation was unnecessary, as, the sale being contemporaneous, the right would pass to Mackrell without express reservation.

Implied grant (whose severance of quasi-easements which are continuous and apparent.

The rule was applied where the same will contained a devise of the quasi-dominant tenement to A. and the quasi-servient tenement to B. (g).

The case of *Swansborough v. Coventry*, referred to above (r), illustrates the further point that the implied grant may be negatived or modified either by the terms of the contract or conveyance (s), or by reference to the circumstances existing at the date of the grant.

(5) Implication of a grant is subject to the contract and surrounding circumstances.

The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee (t). "You are also entitled to inquire into the surrounding circumstances which are relevant to such a question—the circumstances affecting the two pieces of land. In order that the circumstances may be relevant they must, in my opinion, have been known to both the parties. But if they are known to both, those circumstances must also be considered in order to see whether there is or is not an implied grant of the right to light over the adjacent land" (u).

In *Swansborough v. Coventry* the implication was held not to be affected (except as regards the ground-floor windows) by the fact that the land conveyed was described in the conveyance as bounded

(g) *Phillips v. Low*, 1892, 1 Ch. 47; 61 L. J. Ch. 44; and cf. *Milner's Safe v. Great Northern and City R. Co.*, 1907, 1 Ch. 208; 76 L. J. Ch. 99; and *Nicholls v. Nicholls*, 1900, 81 L. T. 811 (both cases of right of way). Dist. *Taws v. Knowles*, 1891, 2 Q. B. 564; 60 L. J. Q. B. 641.

(r) Page 127.

(s) *Salaman v. Glover*, 1875, 20 Eq.

444; 44 L. J. Ch. 55; cf. *Haynes v. King*, 1893, 3 Ch. 439; 63 L. J. Ch. 21.

(t) *Birmingham Bank v. Ross*, 1888, 38 Ch. D. 295; 57 L. J. Ch. 601.

(u) *Quicke v. Chapman*, 1903, 1 Ch. 659; per Romer, L.J., at p. 671; 72 L. J. Ch. 373; and see *Barrows v. Lang*, 1901, 2 Ch. 502; 70 L. J. Ch. 607; *Godwin v. Schweppes*, 1902, 1 Ch. 926; 71 L. J. Ch. 438.

Implied
grant
(where
severance)
of quasi-
easements
which are
continuous
and apparent.

*Murchie v.
Black.*

by "building land"; and *Broomfield v. Williams* (x) and *Pollard v. Gare* (y) are to the like effect.

But in *Murchie v. Black* (z) land was put up for sale in lots, upon condition that the purchaser of each lot should build on it according to a specified elevation. The plaintiff purchased one lot, on which stood a wall, the defendant the adjoining lot. Before the lots were conveyed, the defendant, in excavating the land bought by him in order to build according to the conditions, deprived the wall of its lateral support, and it fell; but, upon action brought, it was held that the plaintiff had no remedy. "If," said Erle, C.J., "there had been a single conveyance to the defendant of lot 6, lot 7 would have been entitled to support as well at law as in equity, according to the series of authorities cited by Mr. James. But the question is, whether there is not in the conveyance of 1860 that which justifies what otherwise would have been an actionable wrong on the part of the defendant. If the defendant had simply dug so near the plaintiff's land as to deprive it of the lateral support it was entitled to, he would, no doubt, have been liable to an action. But here the vendor, being the owner of both lots, sells lot 6 to the defendant; and according to the terms of the contract by which it is conveyed to him, he makes it obligatory on him to do, or at all events within the provisions of that contract he was only doing his duty to his vendor when he did, the act which brought down the plaintiff's house." It appears that the plaintiff had added to his wall; but the case found that, even if he had not done so, the defendant's excavations would have brought it down. Some of the judges, however, founded their decision on this fact (a).

*Rigby v.
Bennett.*

In *Rigby v. Bennett* (b) the same principle was appealed to; but the circumstances were different. In July, 1868, property was put up for sale by auction in lots, under conditions which bound each purchaser to build on the property purchased by him to the satisfaction of the vendors. None of the lots were knocked down at the auction; but the plaintiff shortly afterwards agreed to purchase one lot under the auction conditions, and proceeded to erect a building upon it. The foundation of his building was not carried to the stipulated depth; but this variation was made with the consent of the vendors. In August, 1869, the plaintiff's house having been already carried up to the joists of the first floor, the

(x) 1897, 1 Ch. 602; 66 L. J. Ch. 655.

(y) 1901, 1 Ch. 834; 70 L. J. Ch. 404.

(z) 1865, 19 C. B. N. S. 190; 34 L. J. C. P. 337; 147 R. R. 555.

(a) See Part V., Chap. 4, "Extinction of easement by alteration of dominant tenement."

(b) 1882, 21 Ch. D. 559.

defendant agreed to buy the adjoining lot, also under the conditions prescribed at the auction. In October, 1869, the plaintiff, having almost completed his building, took a conveyance (which, under the conditions, took the form of a lease) of his lot. The defendant obtained his lease in October, 1872, but did not commence building until 1881. The defendant's operations having endangered the foundations of the plaintiff's house, the action was brought to have it determined whether the plaintiff was entitled to support, and who was liable to pay for the necessary underpinning. It was held by Bristowe, V.-C., that the defendant was liable, and his decision was affirmed on appeal. The Court declined to treat the contracts as simultaneous, the interval of thirteen months being too great to permit of it. It followed, therefore, that the general rule applied, and the plaintiff was, by virtue of his contract and lease, entitled to support. It was not expressly decided what amount of support he could claim. It may be noted that Jessel, M.R., hinted that, if a house and land were sold together, and the land were sold for building, the general rule might not apply; and that Cotton, L.J., declined to consider "what would be the consequence if the grantee knew that the grantor intended to use the adjoining land for a particular purpose and the right claimed by the grantee was inconsistent with that purpose."

Implied grant (where conveyance) of quasi-easements which are continuous and apparent

In *Birmingham Bank v. Ross* (c) the point so reserved came up for decision. There, the corporation of Birmingham had made a scheme for the improvement of an unhealthy area within the borough; and the maps accompanying the scheme showed some intended new streets. One Daniell agreed to take a lease of a piece of land comprised in the scheme, and abutting on one side on a new street to be called Warwick Passage, and to build upon the land. Daniell knew that the corporation intended to build on the ground on the other side of Warwick Passage; and it was stipulated in the agreement that the passage should be twenty feet in width. Daniell built and took his lease of the land and the new buildings thereon, lights not being mentioned in the lease, and subsequently assigned the lease to the plaintiffs. The defendant, by agreement with the corporation, erected on the other side of Warwick Passage a building which obstructed the plaintiff's lights, and it was held that he was entitled to do so. Daniell knew that the corporation intended to build on the other side of the passage, and bargained

Birmingham Bank v. Ross.

Implied grant (where severance) of quasi-easements which are continuous and apparent.

Myers v. Catterson.

Implied grant limited by vendor's estate in quasi-servient tenement.

for and obtained special protection against obstruction by means of the stipulation as to the width of the passage; and it was held that he was entitled to no more.

In *Myers v. Catterson* (d) a railway company had sold a house with lights, and the conveyance recited that the adjoining land belonging to the company would be required for the construction of their railway. It was assumed that the company could build on such adjoining land for the purpose of such construction; but it was decided that they could not for any other purpose build so as to obstruct the lights.

Again, the duration of the implied grant is limited by the estate which the vendor had in the quasi-servient tenement at the time of the severance; and, if he subsequently acquires a larger estate, such estate will not be bound by the servitude (e).

And, following out this principle, it has been held that, where the grantor has at the date of the conveyance of the quasi-dominant tenement contracted to sell the quasi-servient tenement without reserving the easement, the servitude does not pass. For, in such a case, the common vendor is, by virtue of his contract, a trustee of the quasi-servient tenement for the purchaser of that tenement; and the Court will not imply a grant which would be an alienation of the property of another. The rule assumes that the grantor is the common owner of both tenements; and both the purchaser and the Court are "thrown upon inquiry" whether this is so. If the quasi-servient tenement is sold, the assumption fails; a stranger is the owner, and there is no implication (f).

"In order to see whether a grant of light over the adjacent land is to be implied, you must inquire . . . into the title to that adjacent land, to see whether the grantor has such an estate or interest in it as will support an implied grant by him of the right to the access of light over it" (g).

Onus of proof.

It would seem that the onus of showing the state of the tenements at the date of severance is on the party claiming the easement. For, even when an "apparent sign" of dependence and a previous

(d) 1889, 43 Ch. D. 473; 59 L. J. Ch. 315; cf. *Wilson v. Queen's Club*, 1891, 3 Ch. 522; 60 L. J. Ch. 698.

(e) *Booth v. Alcock*, 1873, 8 Ch. 663; 42 L. J. Ch. 557; *Godwin v. Schweppes*, 1902, 1 Ch. 932; 71 L. J. Ch. 438. Compare *Davis v. Town Properties*, 1903, 1 Ch. 797; 72 L. J. Ch. 389. Of course, if the servitude is expressly

granted for a term exceeding the original interest, the grant may have effect (*Rymer v. McIlroy*, 1897, 1 Ch. 528; 66 L. J. Ch. 336).

(f) See the judgment of Chitty, J., in *Beddington v. Atlee*, 1887, 35 Ch. D. 317; 56 L. J. Ch. 655.

(g) *Quicke v. Chapman*, 1903, 1 Ch. 670; 72 L. J. Ch. 373, per Romer, L.J.

unity of possession were shown, the Court declined to presume that the "apparent sign" had its origin during the unity (*h*).

Implied grant (whether severance) of quasi-easements which are continuous and apparent.

(b) *Rule as to a Grant of Continuous and Apparent Easements being implied on a Severance of Tenements considered in the Case of Rights of Way.*

Where a quasi-easement enjoyed by one tenement over another during a unity of ownership is not in its nature apparent and continuous, then upon a severance of the ownership no grant will be implied. The doctrine of implied grant, like the destination du père de famille, confers a title only to easements which are apparent and continuous (*i*).

To imply a grant of a quasi-easement on the severance of a tenement, the easement must be apparent and continuous.

"It is obvious," says Pardessus, "that this disposition (*état des lieux*), which, from a simple destination du père de famille, thus changes itself into a servitude, must not be a momentary change for the sake of some temporary convenience; it is scarcely possible to suppose, in the absence of express agreement, that a party would have desired to preserve a right which served only for purposes purely personal, or mere pleasure. The parties are presumed to have been desirous of preserving those servitudes only which are evidently necessary" (*k*).

And that the doctrine is confined to easements which are in some sense "apparent and continuous" is evident from the judgments in all the principal authorities (*l*).

Taken literally, this phrase would exclude altogether from the rule of implied grants the easement of a way. A way is not in the ordinary sense a continuous easement. But, when the cases referred to are examined, it seems possible to understand the word "continuous" to refer in this connection, not to continuity of enjoyment, but to permanence in the adaptation of the tenement; and, so understood, the rule becomes both more in accordance with the principles of non-derogation and qualified necessity by which it is generally explained (*m*), and more easy to reconcile with all the authorities, including those now to be quoted.

Meaning of "continuous."

"The judgment of Bramwell, B.," wrote Mr. W. H. Willes, "in

Mr. Willes' opinion.

(*h*) *Moody v. Steggles*, 1879, 12 Ch. D. 261; 48 L. J. Ch. 639.

(*i*) Code Civil, arts. 692, 694.

(*k*) Pardessus, *ubi sup.*

(*l*) *Worthington v. Gimson*, 1860, 2 E. & E. 618; 29 L. J. Q. B. 116; 119 R. R. 873; *James v. Plant*, 1836, 4 A. & E. 749; 6 L. J. (N. S.) Ex. 260; 43 R. R. 465; *Pearson v. Spencer*,

1862, 3 B. & S. 761; *Bolton v. Bolton*, 1879, 11 Ch. D. 968; 48 L. J. Ch. 467; *Polden v. Bastard*, 1865, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; *Whieldon v. Burrows*, 1878, 12 Ch. D. 31; 48 L. J. Ch. 853; cf. *Daniel v. Anderson*, 1862, 31 L. J. Ch. 610; 156 R. R. 422.

(*m*) Above, pp. 110—112.

Implied
grant
(where
severance)
of quasi-
easement,
being a right
of way.
Mr. Willes'
opinion.

Glave v. Harding (n), explains the principle upon which it is to be determined whether the doctrine discussed in this section of the text applies to any particular case. He said, 'With regard to the right of way . . . the plaintiff's title was derived from the lease; and, unless the lease granted the right of way, it did not exist. It did not grant the right in terms; and the only way in which it could grant it was, that the condition of the premises at the time the lease was granted showed that it was intended that the right of way should be exercised, upon the principle of law that, by the devolution of two tenements originally held in one ownership, a right of way to a particular close or gate would, as an apparent and continuous easement, pass to the owner and occupier of both of them. But I think that the way in question was not a continuous and apparent easement within the principle of law; and, therefore, I arrive at the conclusion that there was no evidence of the right of way alleged in this case. I found my opinion upon the condition of the premises at the time the lease was granted, . . . there being then only excavations for foundations, with openings which were wholly of an uncertain character and would have been equally appropriate for a door, a window, or any other of the purposes to which such an opening might possibly be applied' (o).

"The reasoning of the learned Baron may seem to be inconsistent with the authorities already referred to (p), which confirm the opinions expressed by the author in the second edition of this work, that upon the severance of a tenement there is no implied grant of such easements as ordinary ways. But the inconsistency is only apparent, it being obvious that there are some cases of ways where the *necessary* and *permanent* dependence of a house upon an adjoining tenement is exhibited by some permanent sign, i.e., 'part of the structure,' for the enjoyment of which a way is necessary; as, for instance, in the case of two adjoining houses where the coal shoot used for filling the cellar of one opens in the yard of the other; or in the case of two adjoining houses standing in a garden, the hall doors of the houses opening into the garden, and there being ways from the hall doors to the high road. If

(n) 1858, 27 L. J. Ex. 292; 114 R. R. 1628.

(o) In the same case, Pollock, C.B., expressed his opinion that, "if a man builds a house, and there is actually a way used, or obviously and manifestly intended to be used, by the occupiers of

the house, the mere lease of the house would carry with it the right to use the way, as part of its construction;" but intimated that the Court was not quite agreed upon this principle.

(p) Above, p. 135, note (l).

in the first case the owner conveys one house to a purchaser, or if in the latter case the owner of the houses and garden conveys one house to a purchaser, it is presumed that he could not in the first case prevent the purchaser from filling his cellar through the shoot, nor in the second from getting into the highway from his hall door through the garden, because in the first the coals might be brought through the door, or in the second because there happened to be a back entrance through a stable yard from a mews in the rear, so as to prevent a way of absolute necessity from being set up through the garden.

Implied grant (where severance) of quasi-easement, being a right of way.
Mr. Willes' opinion.

“ Even in the case of drains, referred to in the authorities already cited, the easement is not strictly ‘continuous:’ the drain is not always flowing, but there is a necessary and permanent dependence of the house upon it for its enjoyment as a house, in the state in which it is at the time of the conveyance. Nor is any distinction drawn between drains arising by the act of man, and those from natural causes, as rain water.

“ In the case of a landlocked house there is an *absolute* necessity for a right of way to it. In such cases as *Pyer v. Carter* (*q*) there is not an absolute necessity, for the plaintiff might have made a drain through his own land for a mere trifle.

“ *Richards v. Rose* (*r*) was treated as a case of absolute necessity.

“ *Worthington v. Gimson* (*s*) was a case where there were two roads to a market town from a farm, the only difference being that one was shorter than the other. A claim of a right of way into the shorter was set up, on the ground that the existence of a cart way at the time of the conveyance, indicating that the shorter way had been used before the conveyance of the farm, together with the fact of the user, were sufficient to bring the case within the rule. The distinction between such a case,—where the farm might be perfectly well enjoyed as a farm with either road, and that (which has been put) of the house where the use of a way from the front door to a highway, though not absolutely necessary (as in the case of a landlocked tenement), is necessary in order that the house may be enjoyed in the ordinary manner as a dwelling-house at all,—is obvious. But, in truth, the point was not raised, because the question of necessity was not left to the jury, doubtless for want of evidence upon it.

(*q*) 1857, 1 H. & N. 916; 26 L. J. Ex. 258; 108 R. R. 896; below, p. 155.
(*r*) 1853, 9 Exch. 218; 23 L. J. Ex.

3; 96 R. R. 675.
(*s*) 1860, 2 E. & E. 618; 29 L. J. Q. B. 116; 119 R. R. 873.

Implied
grant
(where
severance)
of quasi-
easement,
being a right
of way.
Mr. Willes'
opinion.

"*Pheysey v. Vicary (t)* was a peculiar case, which was ultimately compromised upon terms, nor was the question of necessity ever left to the jury. If it had been, the Court would have had an opportunity of dissenting from *Hinchcliffe v. Earl of Kinnoul (u)*.

"There appear to be two classes of cases.

"1. Where there is no *absolute necessity* for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when sold, upon the adjoining tenement.

"2. Where there is an *absolute necessity*, as in the case of a land-locked tenement, or in such cases as *Richards v. Rose*, where the houses could not exist as houses *at all* without mutual support.

"The first class of cases are those which the author describes under the head of disposition of owner of two tenements; and it is a question of fact for a jury to say whether the easement claimed is necessary for the use of the house, or any part of it.

"It seems that there are some cases of ways which would fall within the first class, namely, ways which are *essential* to the enjoyment and use of those things which are the subject of the grant, as in the case put of the coal shoot and hall door. The judgment of the Court of Common Pleas in *Hinchcliffe v. Kinnoul (u)* is conclusive upon this point. It is obvious that a hall door is as necessary to the convenient enjoyment of a dwelling-house for entrance by the hall, as a coal shoot for putting coals into the cellar, and that neither are the less so because persons may get into the house through a stable and kitchen, or may bring their coals in through the doors or windows; and as, in *Hinchcliffe v. Kinnoul*, the Court was of opinion that a right of way to the coal shoot would be implied, the jury having found that a right of way to it was necessary, so it should seem that it would also have held that it would be implied to the hall door in the case suggested above.

"The judgment in *Hinchcliffe v. Kinnoul* establishes, that, upon the conveyance of a house 'consisting of certain parts,' easements necessary to the use of those parts, as they actually stood at the time of the conveyance, pass by implied grant without reference to the question of absolute necessity, in the sense that the person to whom the house is conveyed might possibly be able so to alter the construction of the house as to be able to dispense with those easements; and, as it has been already pointed

(t) 1847, 16 M. & W. 484; 73 R. R. 583.

(u) 1838, 5 Bing. N. C. 1; 50 R. R. 579; 8 L. J. (N. S.) C. P. 105.

out, the same question was never really raised either in *Pheypsey v. Vicary*, or *Worthington v. Gimson*."

The above observations were to some extent new when they were advanced in a former edition of this work; and, although their importance is somewhat lessened by the new statutory importation into every conveyance of a grant of ways "occupied or enjoyed" with the tenement granted (*x*), it is still worth while to collect the cases bearing upon the point, which will be done in the following pages (139—152).

In 11 Hen. 4, 5, pl. 12, Hankford, J., demanded of Huls: "If a man has a way appendant to his frank tenement to go over the land of another, if he purchases the land in which he has the way, and afterwards the same land in which he had the way passes into strange hands, if he shall still have the way or not?" Huls says: "He shall have it and use it, for that a way is more necessary to a man than any other appendant; but, if it had been common appendant, it would have been extinct in perpetuum." Hankford, J.: "In this regard I don't see any diversity, for without having pasture for any beasts my land cannot be (gayne); so one is as necessary as the other." Culpepper: "The unity of possession in the one case, as well as the other, extinguishes everything." Hankford, J.: "A man cannot have appendancy in his own soil; and when he purchases the land in which he has the way, the way is no longer appendant, for he may make what ways he pleases in his own soil, though he had not any there before, by reason of the property which he has in the soil, by which the appendancy is extinct; and if the appendancy be extinct, and the appendancy is the reason of the title, *ergo* the way is gone for ever."

In *Morris v. Edgington* (*y*) the tenant of a public-house sued his landlord for obstructing a way demised by the lease. The greater part of the premises demised lay on the west side of a gateway; but they also comprised a tap-room to the east of the same gateway. When the gate was shut, the tap-room might be approached by entering the coffee-room in the western part of the premises. But the obvious and usual approach to the tap-room from the street was through the open gateway, upon entering which the door of the tap-room was seen on the eastern side of it, with a finger-board pointing and directing "To the tap-room." The lease to the plaintiff, which included the tap-room, gave the lessee a right of way through the lessor's yard lying beyond the gateway

Implied grant (where severance) of quasi-easement, being a right of way.
Mr. Wiles' opinion.
Decisions bearing on question whether on severance of a tenement there is an implied grant of right of way.
Year-book.

Morris v. Edgington.

(*x*) Above, p. 84.

(*y*) 1810, 3 Taunt. 24; 12 R. R. 579.

Implied grant (where severance) of quasi-easement, being a right of way.

Morris v. Edgington.

to some cellars lying at the back, but no express right of way to the tap-room; and the gateway and yard were expressly reserved to the lessor.

The lessor having shut the gates at nightfall for the protection of the cows in the yard, and thus deprived the lessee of some of his custom, this action was brought. The plaintiff obtained a verdict, and the Court of Common Pleas refused to set it aside.

"I say nothing," said Mansfield, C.J., "of what is a way of necessity; I know not how it has been expounded. But it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for anyone to go to the tap-room through the gateway than through the coffee-room. And it is much more convenient to carry out beer through the gateway than through the coffee-room. Can it then be doubted that the intent was to give the same use of the way over the gateway as the lessor before used to have? . . . The argument founded on the expression of the special right of way goes too far; for, if it deprives the plaintiff of this way, it deprives him of all ways to the tap-room." The argument founded on the reservation of the gateway was disposed of by Lawrence, J., on the same ground.

This case is not conclusive on the point, as it is sufficiently supported by the principle that, some way being necessary, the most usual and convenient should be taken. But the dictum of Sir J. Mansfield is of great importance.

Hinchcliffe v. Kinnoul.

In *Hinchcliffe v. Kinnoul* (a) it appeared that in the year 1819 Earl Grosvenor, who was entitled, in reversion expectant on a ground lease expiring in 1824, to a messuage and an adjoining passage, demised the messuage to the plaintiff (who was then in possession as under-lessee) for a term to commence on the expiration of the ground lease. Shortly afterwards, namely, in 1822, Earl Grosvenor demised the passage to Viscount Hampden (who was also in possession under the ground lease) for a term to commence on or about the expiration of the ground lease. It appeared that, at the time of the execution of the lease of 1819, the plaintiff's messuage included a coal shoot or coal hole opening into the passage, a waterpipe under the passage, and two other pipes running down the wall of the house over the passage—all which, according to the finding of the jury, were necessary for the con-

(a) 1838, 5 Bing. N. C. 1; 8 L. J. (N. S.) C. P. 105; 50 R. R. 579.

venient and beneficial use and occupation of the messuage. The occupiers of the messuage had long used the passage for filling their coal cellar; and the jury expressly stated that the coal shoot could not be used, and the needful repairs to the pipes could not be done, without passing and repassing over the passage. The plaintiff's lease described the messuage as abutting on the passage (b), and contained a covenant by the lessee to repair the messuage and cleanse the pipes.

Implied grant (where severance) of quasi-easement, being a right of way.
Hinchcliffe v. Kinnoul.

Upon these facts the Court of Common Pleas held that the plaintiff was entitled, by the legal operation of the lease, to a right of way over the passage for the purpose of using the coal shoot and cleansing and repairing the pipes. "We are of opinion," said Tindal, C.J., "that, upon the facts found in the special verdict, such right (the right of way) did pass as a necessary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Comm. 16 a, is 'that by the grant of anything conceditur et id sine qua res ipsa haberi non potest; as, if one grant his trees, the grantee may enter upon his land for the cutting down and carrying them away,' for which the authority of the Year-book, 2 Rich. 2, is cited. And again, Twisden, J., in *Pomfret v. Ricraft* (c), lays down the rule of law to be 'where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. So, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.' Now, in the present case, the jury have found expressly by their verdict that the passing and repassing over the way or passage is not merely convenient but necessary 'for the use of the coal shoot and of the pipes, and for the repairing and amending the same and the side or wall of the house;' to the performance of which, it is also to be observed, the lessees are expressly bound by the covenant entered into by them with the lessor by the same lease.

"Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in

(b) This fact was not adverted to in the judgment; but see above, p. 110.

(c) 1669, 1 Saund. 322. On this

principle see further below, Part IV., Chap. 2.

Implied grant (where severance) of quasi-easement, being a right of way.

the lease itself, as an 'appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining' ? There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is 'an appurtenant' in the strict sense of that word, where such interpretation is necessary in order to give that word some operation ; such are the cases in Moore's Rep. 682 (*d*), *Archer v. Bennett* (*e*), *Hill v. Grange* (*f*), and others. But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point (*g*).

"Upon the whole, it appears . . . that, if the words of the lease will admit of such construction (i.e., of being construed as conferring the right claimed), it was the apparent intention of the parties to that instrument, arising from the state and circumstances of the property and the language of the instrument itself, that they should be so construed."

Pheysey v. Vicary.

In the case of *Pheysey v. Vicary* (*h*) there were two houses, contiguous to the highway, of which there had been unity of ownership. By will, the owner of both devised one to the plaintiff and one to the defendant, each with "the appurtenances thereunto belonging." During the unity, and at the time of the severance, there was a hard carriage-drive used in common, and continued in front of the defendant's house to the plaintiff's front door. The plaintiff had another entrance at the back of his house. It was contended for the plaintiff that, on the severance, a right existed to continue to have the way which had been used during the joint ownership ; for it was an easement of a permanent nature, "stamped upon the land," and as apparent as a right of watercourse. The case was ultimately compromised, the judges intimating that they might order a new trial, to try whether the way claimed was necessary to the convenient occupation of the

(*d*) The case referred to is *Brown v. Nichols*, and is reported as follows :— "Un conduit pur le porter de ewe al un meason voit passer ove le meason per le parol appurtenant, et l'ownor foit venger en aut. soile a ceo mender, mes il doit ceo faire en convenient temps ; et ceo sans special prescription ou special grant.—Per Curiam." This seems to be like *Nicholas v. Chamberlain* (above, p. 116), and no authority for the case of a way.

(*e*) 1676, 1 Lev. 131 ; Sid. 211. This

is a case of parcels.

(*f*) Plowd. Comm. 170. The passage referred to appears to be a discussion of the question whether land can be properly described as appurtenant to land.

(*g*) The cases cited certainly do not seem to support the argument referred to, which could not, it is conceived, be successfully advanced at the present day (above, p. 87).

(*h*) 1847, 16 M. & W. 484 ; 73 R. R. 583.

plaintiff's house. In the course of the argument, Parke, B., asked: "Is the way contended for by the plaintiff to be construed as of absolute necessity for access to property in its strict sense, as in the older cases, or as necessary to the convenient enjoyment of his dwelling-house with reference to its condition at the time the testator had the lease of it, as put in *Morris v. Edgington* (i) by Sir James Mansfield, who says 'it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had'? One or other of the ways then in question was essential to the use of the house, and the Court ruled that the most convenient of these was that way of necessity to which the party was entitled. That decision is confirmed in *Barlow v. Rhodes* (k), which shows that the way asserted in *Morris v. Edgington* might be so asserted as a way of necessity." Alderson, B.: "Had this been not a dwelling-house, but a field used for tillage, the way which would pass must be such as would enable the owner to use the field in every possible way, e.g., to get wagons, &c., in. Then, in this case of a dwelling-house, must not the way be such as would enable him to get conveniently to every part of it?"

Implied grant (where severance) of quasi-easement, being a right of way.
Phoebey v. Vicary.

The decision in *James v. Plant* (l) turned upon a grant of ways "usually held, used, occupied, or enjoyed," with the quasi-dominant tenement. The case was decided upon demurrer; and it does not appear whether there was any "visible sign" of the existence of the way.

James v. Plant.

In *Worthington v. Gimson* (m) two farms had belonged to two persons as joint owners, and the occupier of one of them had long used a way over the other. It does not appear whether there was a hard or visible track; but the way had been regularly used for many years. It was held that, upon a partition under which the farms were conveyed to separate owners in severalty, there was no implied grant of the right to use the way. Crompton, J., after quoting with approbation the author's distinction between continuous and apparent easements on the one side and ways on the other (n), continued: "It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass when the property is severed, as part

Worthington v. Gimson.

(i) 1810, 3 Taunt. 31; 12 R. R. 579; above, p. 140.

(k) 1833, 3 Tyr. 280; 2 L. J. (N. S.) Ex. 91; 38 R. R. 653.

(l) 1836, 4 A. & E. 749; 6 L. J.

(N. S.) Ex. 260; 43 R. R. 465.

(m) 1860, 2 E. & E. 618; 29 L. J. Q. B. 116; 119 R. R. 873.

(n) Above, p. 113.

Implied grant (where severance) of quasi-easement, being a right of way.

Worthington v. Gimson.

Pearson v. Spencer.

of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, *from the nature of a road*, whether the parties intended the right of using it to pass."

In *Pearson v. Spencer* (o) the plaintiff and the defendant claimed under the same deviser. The only way to the defendant's land was through the plaintiff's. The devise to the defendant made no mention of ways; but there was a road through the plaintiff's land which the deviser had used, and which for some distance skirted the hedge of the defendant's land until it came to a gate; and the question was, whether the defendant had a right of way along the road used by the deviser, or only up to the point where it joined his hedge. The Exchequer Chamber say: "We sustain the judgment of the Court below on the construction and effect of James Pearson's will, taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had unity of possession of all this property. He intended to create two distinct farms, with two distinct dwelling-houses, and leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of way to it, and we think the way in question passed with that devise. It falls under the class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenements. These are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner."

Langley v. Hammond.

In *Langley v. Hammond* (p), the defendant, having taken a surrender of part of a farmyard adjoining her premises, with the appurtenances "used and enjoyed" with the part surrendered, claimed the right to use a road running through the remainder of the surrenderor's property. The way was to some extent defined, but does not appear to have been hard and gravelled. The defendant's contention was negatived, two of the judges deciding

(o) 1862, 1 B. & S. 571; 124 R. R. 656; affirmed in error, 3 B. & S. 761; 124 R. R. 667.

(p) 1868, L. R. 3 Exch. 161; 37 L. J. Ex. 118.

the case on the authority of *Thomson v. Waterlow* (q). But Bramwell, B., gave judgment as follows:—

“I also think this rule must be discharged. I am not prepared to say and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and of possession. And should the case arise, I should wish for a time to consider before I assented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I shou'd wish for time to consider before deciding that on the conveyance of the house the right to use the road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is, that there is here really no defined road. It is said that it is hard and gravelled, but in truth as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the illustration) than the short cut a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way which he may use, but he only uses it equally with ways in other directions, by virtue of his rights of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to.”

Implied grant (where severance) of quasi-easement, being a right of way.
Langley v. Hammond.

In *Watts v. Kelson* (r) Mellish, L.J., in the course of the argument made the following observation: “When a man walks over his own land in a particular direction, he is not using anything; he is merely going where he pleases on his own property. But where there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that, if a man constructs a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field.” And in giving the judgment of the Court, he says: “We may also observe that, in *Langley*

Watts v. Kelson.

q) See above, p. 92.

r) 1870, 6 Ch. at pp. 172, 174; 40

L. J. Ch. 126. The decision did not depend on this point (see above, p. 123).

Implied
grant
(where
severance)
of quasi-
easement,
being a right
of way.
Watts v.
Kelson.

v. Hammond (*s*), Baron Bramwell expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words" (*t*).

In both of these cases, the conveyance which was the subject of adjudication included ways "used and enjoyed" with the alleged dominant tenement; and they are, therefore, no express authority upon the effect of a conveyance without those words.

Davies v.
Sear.

The case of *Davies v. Sear* (*u*) was an authority in favour of the implied reservation of a way, the "apparent sign" in this case being an archway upon the quasi-dominant tenement. But this case, so far as it rests on the doctrine of implied reservation pure and simple, must now be deemed to be overruled by *Wheeldon v. Burrows* (*x*).

Brett v.
Clowser.

In *Brett v. Clowser* (*y*) the plaintiff sued the defendant Clowser, among other things, for the obstruction of a right of way claimed by the plaintiff over Clowser's premises. It appeared that Clowser, who had occupied his premises since 1867 under an agreement for a lease entered into by the common owner of the plaintiff's and defendant's premises, had made an arrangement with a former tenant of the plaintiff's premises, which was expressly limited to the duration of such tenant's interest, under which a door had been opened from part of the plaintiff's premises into Clowser's premises, and a way, leading from this door to the high road, had been used by the tenant in question and his customers. In June, 1878, the tenant's interest expired. In September, 1878, the premises occupied by him were re-let to the plaintiff, with all ways, &c., belonging or appertaining thereto. In October, 1878, Clowser took a legal demise of his premises under his old agreement. The plaintiff claimed a right of way through the doorway into the high road.

Denman, J., in giving judgment for the defendant, said that the question must turn upon whether the lease of September contained any such words as to create anew the right of way claimed. "It was contended for the plaintiff that it did, because the way was an

(*s*) 1868, L. R. 3 Exch. 161; 37 L. J. Ex. 118.

(*t*) Cf. *Kay v. Oxley*, 1875, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210. Fry, J., quoted and adopted these dicta in *Barkshire v. Grubb*, 1881, 18 Ch. D. 616; 50 L. J. Ch. 731; but that case also

was not decided on this ground (see above, p. 99).

(*u*) 1869, 7 Eq. 427; 38 L. J. Ch. 545.

(*x*) 1879, 12 Ch. D. 31; 48 L. J. Ch. 853; below, p. 161.

(*y*) 1880, 5 C. P. D. 376.

obvious one, passing through a made doorway and over a defined path, and being in actual use at the time at which the lease of the 23rd of September, 1878, was made; and a dictum of Bramwell, B., in the case of *Langley v. Hammond* (z) was strongly relied on. That, however, was a case in which the words of the deed in question were these, 'together with all ways therewith' (i.e., with the premises) 'now used, occupied, and enjoyed,'—words which render the dictum wholly inapplicable to the present case. The words of the lease to the plaintiff relied upon as conveying the right of way in question were the words 'ways, paths, passages, easements, commodities, advantages, and appurtenances to the said premises, belonging or in anywise appertaining.' It was contended that the way in question passed under these general words, and the judgment of Lord Justice Mellish in *Watts v. Kelson* (a) was cited in support of that contention. . . . *Kay v. Orley* (b) was also relied upon, in which Lush, J., speaks approvingly of the view taken by Bramwell, B., in *Langley v. Hammond*. But, in all these cases, the 'general words,' found in the conveyance, which were relied upon, were words descriptive of the easements in question, as 'with the premises now occupied or enjoyed;' and they are therefore no authorities for the plaintiff in the present case, which falls within the doctrine laid down in *Worthington v. Gimson* (c), *Pearson v. Spencer* (d), and *Wheeldon v. Burrows* (e), that, except in the case of a way of necessity, in the absence of any reservation, no right to use ways which have been used and enjoyed in fact passes to a grantee of the land, unless there be something in the conveyance to show an intention to create the right to use the way *de novo*."

Implied grant (where severance) of quasi-easement, being a right of way.
Brett v. Clowser.

The decision in *Brett v. Clowser*, so far as it rests on the opinion above quoted, appears to be directly contrary to the dicta of Bramwell, B., Mellish, L.J., and Lush, J., above quoted, and in fact to decide the point under discussion. But it may be observed that Denman, J., does not seem to have had before him the cases of *Hinchcliffe v. Kinnoul* and *Pheysey v. Vicary*, above quoted; and that the actual decision in *Brett v. Clowser* is sufficiently supported by the consideration that at the date of the plaintiff's lease the adjoining premises were, by virtue of the agreement of 1867, equitably vested in Clowser (f).

Observations on *Brett v. Clowser*.

(z) 1868, L. R. 3 Exch. at p. 171; 37 L. J. Ex. 118; above, p. 145.
(a) 1870, 6 Ch. at p. 174; 40 L. J. Ch. 126.
(b) 1875, L. R. 10 Q. B. 360; 41 L. J. Q. B. 210.
(c) 1860, 2 E. & E. 618; 39 L. J.

Q. B. 116; 119 R. R. 873.
(d) 1862, 1 B. & S. 571; 124 R. R. 656; 3 B. & S. 761; 124 R. R. 667.
(e) 1879, 12 Ch. D. 31; 48 L. J. Ch. 853.
(f) See *Beddington v. Atlee*, quoted above, p. 124, note.

Implied
grant
(where
severance)
of quasi-
easement,
being a right
of way.

Bayley v.
G. W. R.

The decision in *Bayley v. G. W. R.* (g) turned on the words of the conveyance; but Chitty, J., in the course of his judgment made some observations which bear directly on the point under discussion. "Before I go to the authorities," he says, "I will mention the following point. During the argument I put this case to the plaintiff's counsel. Assume that a house abuts on a private road belonging to the owner of the house, with its front door opening on to the private road, and that there is an ordinary back way to the house, so that, as a matter of fact, you could get into the house, not by the front door in the ordinary way, but by the back door. If, in those circumstances, the owner of the house and of the private road in front were to grant the house, and the deed were entirely silent as to the private road running in front, would the grantee of the house have a right of way? The plaintiff's counsel said 'No'; and, as far as I am aware, there is no express decision on the point. But, if that point should ever come for decision, it seems to me it will be worthy of consideration, whether the same principle which applies to the grant of a house with reference to light should not apply to the grant of the house with reference to a way of this kind. I am assuming that in such a case there is a front door, and that the private road is the usual mode of access to the house as a house, a man not being in the habit of approaching his own house by the back door. I quite admit that in point of law there is a difference between the easement of light, which is always permeating the open spaces which form the windows of a house,—for in that sense, no doubt, the easement of light is continuous; whereas, as regards a right of way, that is a discontinuous easement, because a man is not always walking in and out of his front door. But at the same time the reason why the easement of light passes as against the grantor is because the grantor has granted the house in the state in which it is. It seems to me there is strong ground for holding, if the point should come up for consideration, that, in the case I have put of the right of way, there is in like manner a grant of the house to be used as the house stands, and that the ordinary mode of access to the front door is one that ought to pass. But that is not the case I have now to consider."

Ford v.
Metropolitan
Railways.

In *Ford v. Metropolitan Railways* (h) the point arose, but not directly between grantor and grantee. The plaintiffs were lessees of rooms situate in the back block of a house, the usual (but not

(g) 1884, 26 Ch. D. 441; see p. 453,
and *Ford v. Metropolitan Railways*,
1886, 17 Q. B. D. 12; 55 L. J. Q. B.

296.

(h) 1886, 17 Q. B. D. 12; 55 L. J.
Q. B. 296.

the only) mode of access being through a passage and hall forming part of the front block. A railway company having, under their compulsory powers, taken down the front block and removed the hall, it was held that the plaintiffs were entitled to compensation for loss of their easement. "It was said," said Bowen, L.J., "that this mode of access was a way of necessity. That appears to me to be an imperfect statement of its character. A right of way of necessity is a right which arises by implication; but its true nature and the distinctions which obtain between the present right of access claimed and a right of way of necessity is explained in *Pearson v. Spencer* (i). The present right, using the language of Lord Chief Justice Erle, falls under that class of implied grants 'where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.' It was therefore a private right which the occupiers of these rooms were by law entitled to make use of in connection with their property."

Implied grant (where severance) of quasi-easement, being a right of way.

Ford v. Metropolitan Railways.

At last, in *Brown v. Alabaster* (k), the question came up directly for decision. There a lessee of two plots of land, A and B, had built upon B two houses with gardens, the houses fronting to one road and the gardens communicating with another by garden-gates and a back-way formed over plot A. The back-way, though not the only access to the houses on plot B, was the only convenient way by which manure, &c., could be taken into the gardens, and was admitted to be essential to the comfortable enjoyment of the houses. The houses on plot B, with their "rights, easements, and appurtenances," were conveyed to the defendant, and subsequently plot A to the plaintiff. It was held that the defendant was entitled by implication to a right of way over the back-road. Kay, J., after referring to many of the above cases, proceeded: "It seems to me that the law is this—that a particular formed way to an entrance to premises like these, 'Westbourne' and 'Cottisbrook,' which leads to gates in a wall part of these demised premises, and without which those gates would be perfectly useless, may pass although in some sense it is not an apparent and continuous easement; or rather may pass—because, being a formed road, it is considered by the

Brown v. Alabaster.

(i) Above, p. 144.

(k) 1887, 37 Ch. D. 490; 57 L. J. Ch. 255. Cf. *Thomas v. Owen*, 1887, 20 Q. B. D. 225; 57 L. J. Q. B. 198; cited below, p. 165; and dist. *Taws v.*

Knowles, 1891, 2 Q. B. 564; 60 L. J. Q. B. 641, where the quasi-servient property was in mortgage at the date of severance.

Implied
grant
(where
severance)
of quasi-
easement,
being a right
of way.

Brown v.
Alabaster.

authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or indeed without any general words at all. Here I have a case in which these two gardens, although they are not absolutely inaccessible, are inaccessible except through a part of the house, unless they are to be reached by the gates at the bottom of the gardens communicating with this formed back-way. That it was intended, looking at all the facts, that the persons to whom ‘Westbourne’ and ‘Cottisbrook’ were conveyed should have the use of those two gates and of this back-way, is, to my mind, beyond all doubt. Then, although I agree that it is not for all purposes a way of necessity, do I want any express grant? It seems to me to be clear on the authorities that an express grant is not wanted in such a case as this. Therefore I hold that the right to use this back-way in the same mode as it was usable by the occupiers of ‘Cottisbrook’ and ‘Westbourne’ at the time of the grant of these properties did pass by implied grant, and accordingly this case must be decided on that footing.”

Nicholls v.
Nicholls.

In *Nicholls v. Nicholls* (1) the point was again directly decided, although the learned judge appears to some extent to have based his decision upon general words which he was of opinion ought to be implied. In that case three persons, of whom the plaintiff and defendant were two, were entitled to the residuary real estate of a testator in equal shares. Two adjoining houses, called “Bede burn” and “Stanley Villa,” formed part of the testator’s residuary real estate, and by an agreement entered into by the three beneficiaries for the purpose of dividing the residuary estate, it was agreed (inter alia) that Bedeburn should be taken by and forthwith conveyed to the plaintiff, and Stanley Villa should be taken by and forthwith conveyed to the defendant. These two houses fronted upon a road called Park Road, each having a front entrance from that road. Along one side of Stanley Villa, commencing from Park Road, ran a private side road made up with gravel between walls and fences; this road was continued until it met another road at right angles, which was also made up with gravel between fences and ran at the back of the two houses, affording a back entrance to each of them. The plaintiff claimed the right to the use of this side and back road, and Stirling, J., held that she was entitled to such use on the ground that the agreement being executory was to be followed by conveyances which ought to be

(1) 1900, 81 L. T. 811.

treated as if they were contemporaneous, and that in these conveyances the descriptions should be followed by such general words as, previously to the Conv. Act, 1881, could have been insisted on by a purchaser as a matter of right, and these words he took for the purpose of his judgment to be "together with the ways, rights and appurtenances thereunto belonging." The following passage appears in the judgment: "Although in general a way, not being a way of necessity, does not fall within this rule, still it is established, by many cases, that a formed road over one tenement to and for the apparent use of the other does"; and the learned judge referred to *Pearson v. Spencer* (m) and *Brown v. Alabaster* (n).

Implied grant (where severance) of quasi-easement, being a right of way.
Nicholls v. Nicholls.

In *Brazier v. Glasspool* (o), where the plaintiff claimed a right of way over a tramway owned by the defendant, in respect of a piece of land granted to him by the defendant, Byrne, J., although deciding the point in the plaintiff's favour under the Conv. Act, 1881 (p), expressed his opinion that there was an implied grant of the right of way, which, though not a way of necessity, was a way constructed in accordance with a prior agreement between the plaintiff and the defendant, and was an apparent and formed tramway at the date of the conveyance, enjoyed in such a manner as to lead to a reasonable expectation that the enjoyment would be permitted to continue.

Brazier v. Glasspool.

In *Milner's Safe v. Great Northern and City Railway* (q) the question arose again, and was treated by the learned judge as being hardly open to question, at any rate in the case of grants inter vivos. In that case a testator built a row of houses, fronting on to a public street, and having a narrow passage at the back with which they all communicated. The plaintiffs were owners in fee of two of these houses, and the defendants of two others, both deriving their title from the testator, who had made no express grant of any rights of way over the passage, in dealing with the property by his will. The defendants pulled down their houses, and built on their site an underground railway station, whence their passengers made use of the passage. The plaintiffs brought an action against the defendants to restrain this user. Kekewich, J., after stating the facts, continued as follows: "The first question is whether the several devisees had rights of way over the passage.

Milner's Safe v. Great Northern and City Railway.

(m) Cited above, p. 144.

(n) Cited above, p. 149.

(o) 1901, W. N. 237.

(p) 44 & 45 Vict. c. 41, s. 6.

(q) 1907, 1 Ch. 208; 76 L. J. Ch. 99; compromised on appeal.

Implied grant (where severance) of quasi-easement, being a right of way.

Milner's Safe v. Great Northern and City Railway.

None are expressly given, but it is said that rights must be implied from the surrounding circumstances, and I entertain no doubt that this contention is sound. If this were a case of grant instead of devise, rights of way would necessarily be implied, and there is ample authority for the proposition that the settled law as regards implied grants is applicable to devises, where the circumstances demand its application." The learned judge referred to *Phillips v. Low* (r), and to *Pearson v. Spencer*, quoting from the passage in the judgment delivered by Erle, C.J., in the latter case, which is quoted above (s), and continued: "Bearing in mind that the passage with which we are dealing has been constructed for the convenience of these houses, there seems to be here that 'necessary dependence' of which the Chief Justice speaks" (in *Pearson v. Spencer*), "and that is not at all affected by the fact that these houses had entrances to Finsbury Pavement." The decision was that there was an implied grant both to the plaintiffs and defendants, but that the grant was limited to business and domestic purposes only, and that the user by the defendants was excessive, and unauthorized by the implied grant.

Macnaghten v. Baird.

In *Macnaghten v. Baird* (t) the easement claimed was the right to use water from a well situate on the premises of the plaintiff, by whom these premises and the premises in respect of which the easement was claimed had, prior to 1875, been held. In 1875 the latter premises were let by the plaintiff to a tenant through whom the defendant claimed. The Irish Court of Appeal decided against the easement claimed, on the ground, so far as concerns the question now under consideration, that the defendant's premises, on which a dwelling-house then stood, had upon them, at the date of the letting of 1875, only a barn, for the purpose of which the right claimed was unnecessary, and it was therefore not an existing right at the date of the severance.

Result of the above decisions.

The rules resulting from the above authorities (independently of s. 5 of the Conv. Act, 1881, and evidence of actual enjoyment) appear to be as follows:—

Where two tenements are severed and at the time of severance a formed road exists over one (the quasi-servient) tenement for the apparent use of the other (the quasi-dominant) tenement, such formed road being necessary for the reasonable and convenient enjoyment of the quasi-dominant tenement,

(r) 1892, 1 Ch. 47; 61 L. J. Ch. 44.

(t) 1903, 2 I. R. 731.

(s) Page 144.

a right to use such formed road will, it is submitted, pass by implied grant with the quasi-dominant tenement, even where the only "apparent sign" is the state of the road on the quasi-servient tenement itself. And where the apparent sign of user is a part, not of the tenement retained, but of the tenement conveyed, such as a substantial and permanent doorway or a formed road extending over both tenements, there is ample authority for saying that the doctrine of implied grant applies.

Implied grant (where severance) of quasi-easement, being a right of way.

As regards the cases, however, where there is no formed or defined road over the quasi-servient tenement so that the way is not evidenced by any apparent sign, the rule in the older authorities was clear that upon severance there was no implied grant; in other words, that quasi-easements not continuous and apparent in their nature (like an ordinary right of way) did not pass on severance unless the owner used language to show that he intended to create the easement *de novo* (*u*).

In some modern cases where there was no formed or defined road, the Courts have implied grants of ways as being necessary for the reasonable enjoyment of the quasi-dominant tenement. Thus the implication was made where a plan on the lease showed a strip of land apparently intended to give access to the back of the quasi-dominant tenement (*x*). In another case a lease was taken by B. from A. of a house which abutted on waste land also belonging to A. and across which no defined path existed. Under the circumstances the Court implied a grant by A. to B. of a right of way (for bringing coal's to the house) across the waste land by such route as A. should from time to time point out (*y*).

(c) *Implied Reservation.*

It was the opinion of the author of this treatise that, upon a severance of two tenements connected by some apparent sign of servitude, whether by the grant of the quasi-dominant or of the quasi-servient tenement, an easement was by implication created in favour of the quasi-dominant property. Looking upon the quasi-easement as a quality added to the dominant close by the

The author's opinion.

(*u*) See *Worthington v. Gimson*, quoted ante, p. 143; *Langley v. Hammond*, ante, p. 144; and *Brett v. Clowser*, ante, p. 146.

(*x*) *Rudd v. Bowles*, 1912, 2 Ch. 60;

81 L. J. Ch. 277.

(*y*) *Donnelly v. Adams*, 1905, 1 I. R. 154; see *Gorughly v. McCann*, 1872, I. R. 6 C. L. 411; *Clancy v. Byrne*, 1877, I. R. 11 C. L. 355.

Implied reservation (where severance) of quasi-easements.

owner of both tenements, he held that this quality remained impressed upon it for the benefit of either grantee or grantor. And, in his view, the doctrine that both parties are equally bound to respect the disposition of the property derived additional weight from its coincidence with the analogous case of easements commonly called of necessity, which, it is quite clear, are equally implied in favour of both parties. He saw no reason why a purchaser should not exercise caution in ascertaining what easements his projected purchase is liable to in favour of his vendor as well as in favour of other adjoining owners.

On severance of two tenements there is no implied reservation of quasi-easements.

This opinion, which was shared by Mr. Willes, must now be considered to be overruled, the Courts considering that the operation of the doctrine in question, on a sale of the quasi-servient tenement, is prevented by the principle that "a man cannot derogate from his own grant." But in view of the importance of the controversy, the decisions on both sides of the question will be stated in the following pages (154—166).

Nicholas v. Chamberlain.

In *Nicholas v. Chamberlain*, quoted above (z), the judgment of the Court makes no distinction between the case where the quasi-dominant tenement, the house, is sold first, and the case where it is retained.

Riviere v. Bower.

In *Riviere v. Bower* (a) the plaintiff was proprietor of a house which he had divided into two tenements, one of which he demised to the defendant, retaining the other in his own occupation; the defendant obstructed a window which the plaintiff had made in his own house shortly before the demise to the defendant. On the part of the defendant it was objected that the action did not lie unless the window was ancient. Lord Tenterden held "that the action was maintainable against a person holding as tenant for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there was no stipulation at the time of the demise against the obstruction."

Palmer v. Fletcher.

In *Palmer v. Fletcher* (b) Kelynge, J., said, suppose the land had been sold first and the house after, the vendee of the land might stop the lights. Twysden, J., on the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees, and cited a case to be so adjudged.

(z) Page 116.

(a) 1824, Ry. & Moo. 24; 27 R. R.

726.

(b) 1675, 1 Lev. 122; above, p. 119.

In *Tenant v. Goldwin* (c) Lord Holt, as reported by Lord Raymond, said: "As to the case of *Palmer and Fletcher*, if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and, as he cannot do so, so neither can his vendee. But, if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." The report of the same case by Salkeld, who was himself counsel in the cause, is silent as to any such dictum; and, from the report in 6 Mod. 314, it would seem that the Court only expressed a doubt upon the point. "If he had sold the vacant ground without reserving the benefit of the lights, the Court doubted in that case that the vendee might build so as to stop the lights of the vendor, because he had parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer v. Fletcher*."

Implied reservation (where severance) of quasi-easements. *Tenant v. Goldwin*.

In *Pyer v. Carter* (d) the defendant's house adjoined the plaintiff's, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to the plaintiff. At the time of the conveyances the drain existed, running under the plaintiff's house and then under the defendant's, and discharging itself into the common sewer; water from the eaves of the defendant's house fell on the plaintiff's, and then ran into the drain on the plaintiff's premises and thence through the defendant's premises into the common sewer. The plaintiff's house was drained through the same drain. It was proved that the plaintiff might have made a drain direct from his house into the common sewer, and it was not proved that the defendant when he purchased knew of the position of the drain.

Pyer v. Carter.

It was laid down by the Court that, where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to the benefit of all drains from that house, and subject to all the drains then "necessarily used" for the enjoyment of the adjoining house, and that without any express reservation or grant, inasmuch as the purchaser takes the house "as it is"; and that the question as to what is "necessarily used"

(c) 1705, 2 Lord Raym. 1093; S. C. 1 Salk. 360; 6 Mod. 314.

(d) 1857, 1 H. & N. 916; 26 L. J. Ex. 258; 108 R. R. 896.

Implied
reservation
(where
severance)
of quasi-
easements.

*Pyer v.
Carter.*

depends upon the state of things at the time of the conveyance, and as matters then stood without alteration. And, upon the argument urged that this was not an "apparent" and continuous easement, the Court said that, although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet as he must or ought to have known that there was some drainage for the waters, he ought to have inquired, and the Court "agreed with" the author's observation, that those things are apparent which would be so upon a careful inspection by a person conversant with such matters.

In the case above cited the defendant purchased before the plaintiff, and it appears from the judgment of the Court that the priority of the conveyances in order of time was considered immaterial (*e*).

*Richards v.
Rose.*

In *Richards v. Rose* (*f*), which was an action for removing the support to the plaintiff's house, it appeared that the plaintiff's and defendant's houses adjoined one another and were dependent upon one another for support. Both had been built by and had belonged to one person, and it did not appear which was first granted by him. The Court held that this made no difference. "We are all of opinion," said Pollock, C.B., "that where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of such houses, as against himself, grants such right, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbours still remains."

White v. Bass.

In *White v. Bass* (*g*) the point was directly raised; and the dictum of Lord Holt above referred to was adopted as law. In this case it appeared that the owners in fee of a house and adjoining land (which had never been held separately) had demised the land to certain trustees, who covenanted to build upon it according to a certain plan. The owners afterwards conveyed the reversion of the land to the trustees, and then the house to the predecessor in title of the plaintiff. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct certain windows of the plaintiff which existed at the date of the lease. He did not build according to the plan above referred

(*e*) Cf. *Hall v. Lund*, 1863, 1 H. & C. 676; 32 L. J. Ex. 113; 130 R. R. 725.

(*f*) 1853, 9 Exch. 218; 23 L. J. Ex. 3; 96 R. R. 675; dist. *Howarth v.*

Armstrong, 1897, 77 L. T. 62.

(*g*) 1862, 7 H. & N. 722; 31 L. J. Ex. 283; 126 R. R. 663.

to ; if he had done so, the windows would have been obstructed, but not to the same extent. It was held (*h*) that the defendant was not liable for obstructing the plaintiff's windows, either as to so much light and air as would have been shut out if he had built according to the plan, or as to the excess. All the judges agreed that the lease, being merged, did not affect the case.

Implied reservation (where severance) of quasi-easements.
White v. Bass.

In *Pearson v. Spencer*, in the Exchequer Chamber (*i*), *Pyer v. Carter* was cited and discussed by the judges. Martin, B., says : " I thought that a strange decision, but it has recently been confirmed by the House of Lords."

In *Dodd v. Burchell* (*k*) the parties claimed under the same person. By the side of the plaintiff's house was a passage leading to the defendant's. In the plaintiff's house was a side door opening into the passage ; a door from his garden also opened into the passage. The common owner having first conveyed part of the passage to the defendant, extending beyond the garden door, it was held that no right of way from the garden door, or between the house and garden door, could be implied. Martin, B., there says : "*Pyer v. Carter* went to the very extent of the law, but if considered cannot be complained of ; for, if a man has two fields drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, for the land was sold with the drain in it."

Dodd v. Burchell.

In the case of *Curriers' Co. v. Corbett* (*l*) the plaintiffs claimed an injunction in respect of injury to the light of their houses, caused by houses erected by the defendant upon the opposite side of the street. One of the erections complained of was built upon land formerly sold to the defendant by the plaintiffs ; and as to this erection Kindersley, V.-C., following *White v. Bass*, held that the plaintiffs were not entitled to relief. There was no appeal from this part of the judgment ; but, on the hearing of an appeal by the defendant from the remainder of the judgment (*m*), Turner, L.J., used words which show that he also considered the decision in *White v. Bass* to be law.

Curriers' Co. v. Corbett.

In *Suffield v. Brown* (*n*) the decision in *Pyer v. Carter* was again

Suffield v. Brown.

(*h*) By Pollock, C.B., and Martin, Channell, and Wilde, BB.

(*i*) 1863, 3 B. & S. 762 ; 124 R. R. 667. The reference is no doubt to *Ewart v. Cochrane* (above, p. 121), which is not a direct confirmation of *Pyer v. Carter*, 1857, 1 H. & N. 916 ; 26 L. J. Ex. 258 ; 108 R. R. 896.

(*k*) 1862, 1 H. & C. 113 ; 31 L. J. Ex. 364 ; 130 R. R. 410.

(*l*) 1865, 2 Dr. & Sm. 355 ; 143 R. R. 156.

(*m*) 4 D. J. & S. 764, at p. 771.

(*n*) 1863, 9 Jur. N. S. 999 ; on appeal, 4 D. J. & S. 185 ; 33 L. J. Ch. 249 ; 146 R. R. 267.

Implied
reservation
(where
severance)
of quasi-
easements.
Suffield
v. Brown.

declared to be incorrect. The decision in this case must, indeed, have been the same, although *Pyer v. Carter* and the doctrine of implied reservation had been accepted in their entirety; but Lord Westbury expressly disapproved of *Pyer v. Carter*, and based his decision upon principles inconsistent with it.

The facts of the case were as follows: The plaintiffs owned a dock situate on the Thames at Bermondsey, and used for repairing ships; the defendant owned a coal wharf adjoining the dock. Both tenements had once belonged to the same owner; and during the joint ownership, whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across a strip of land forming part of the wharf. In 1845 the common owner sold and conveyed the wharf and strip of land, without any reservation, to the predecessor in title of the defendant; and shortly afterwards he conveyed the dock to those persons under whom the plaintiffs claimed (*o*). The defendant began to build a warehouse on the strip of land; and the plaintiffs sought to restrain him from building so as to prevent the bowsprits of large ships lying in the plaintiffs' dock from overhanging the land as theretofore, claiming an easement for this purpose as reserved by implication by the common owner.

Lord Romilly granted the injunction (*p*), on the ground that the projection of the bowsprit was essential to the full and complete enjoyment of the dock as it stood at the time when the wharf was sold, and that the purchaser of the wharf had distinct notice of the necessity from the appearance of the property. His Lordship seems to have considered the easement to be apparent, because it could not be exercised without the exercise being seen—an argument which would apply also to a right of way. He does not appear to have dealt with the question of continuity.

The appeal (*q*) was heard by Lord Westbury, then Lord Chancellor, who reversed Lord Romilly's decision. In the course of his judgment Lord Westbury said: "I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor. Consider the easements as if they were rights, members and appurtenances of the adjoining

(*o*) The particulars of sale of the properties represented the dock as capable of holding vessels of large size; but whatever argument might have been founded on this fact was perhaps con-

sidered not to be available after conveyance without rectification of the deeds; see below, p. 161, note (*e*).

(*p*) 9 Jur. N. S. 999.

(*q*) 4 D. J. & S. 185.

tenement ; they still admit of being aliened or released ; and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner. Many rules of law are derived from fictions ; and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of ‘*père de famille*,’ and impressing upon the different portions of his estate mutual services and obligations, which accompany such portions when divided among the members of the family, or even, as it is used in French law, when aliened to strangers. But this comparison of the disposition of the owner of two tenements to the ‘*destination du père de famille*’ is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided. For, when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burthen imposed upon it during his joint occupation ; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such ownership.”

Implied reservation (where severance) of quasi-easements. *Suffield v. Brown*.

Commenting upon the expression of the judges in *Pyer v. Carter* (r), that the purchaser takes the house “such as it is,” his Lordship says : “But, with great respect, the expression is erroneous, and shows the mistaken view of the matter ; for, in a question (as this was) between the purchaser and the subsequent grantee of the vendor, the purchaser takes the house, not ‘such as it is,’ but such as it is described and sold and conveyed to him in and by his deed of conveyance ; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. . . . I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.”

After commenting upon the cases before *Pyer v. Carter*, to which he sees no objection, his Lordship concludes as follows : “But if any part of this theory (the theory of implied reservation) were consistent with law, it would not support the decree appealed from. For the easement claimed by the plaintiff is not ‘continuous’ ;

(r) 1857, 1 H. & N. 916 ; 26 L. J. Ex. 258 ; 108 R. R. 896 ; above, p. 155.

Implied
reservation
(where
severance)
of quasi-
easements.
Suffield v.
Brown.

for that means something the use of which is constant and uninterrupted. Neither is it an 'apparent' easement; for, except when a ship is actually in the dock with her bowsprit projecting beyond its limit, there is no sign of its existence. Neither is it a 'necessary' easement; for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all. But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made."

Crossley v.
Lightowler.

In *Crossley v. Lightowler* (s) the defendants, who had sold to the plaintiffs certain land by the side of a watercourse, claimed to pollute the water, on the ground (among others) that they were in the habit of doing so at the time of the sale, and that the exercise of this right, being apparent and continuous, was impliedly reserved on the sale of the land to the plaintiffs. Lord Chelmsford, L.C., in dealing with this point, referred to Lord Westbury's decision in *Suffield v. Brown*, and said: "I entirely agree with this view. It seems to me to be an immaterial circumstance that the easement should be apparent and continuous; for non constat that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendant would make in every case of this kind an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

Morland v.
Cook.

Morland v. Cook (t), the case of the sea wall, turned upon a different point, the question of the liability of an assignee of land to a covenant entered into by a former owner. But, in the course of his judgment, Lord Romilly, M.R., again treated *Pyer v. Carter* as an authority, and defended against Lord Westbury his judgment in *Suffield v. Brown*, which he rested upon the doctrine of constructive notice (u).

Watts v.
Kelson.

In the course of the argument in *Watts v. Kelson* (x), referred to above (y), Mellish, L.J., is reported to have said: "I think that the order of the two conveyances in point of date is immaterial, and that *Pyer v. Carter* is good sense and good law; most of the common law judges have not approved of Lord Westbury's observations on

(s) 1867, 2 Ch. 478; 32 L. J. Ch. 584.
(t) 1868, 6 Eq. 252; 37 L. J. Ch. 825; see this case commented on in *Austerberry v. Oldham*, 1885, 29 Ch. D. at p. 774; 55 L. J. Ch. 633.

(u) See also *Davies v. Sear*, 1869, 7 Eq. 427; 38 L. J. Ch. 545.

(x) 1870, 6 Ch. 166; 40 L. J. Ch. 126.

(y) Page 123.

it." And James, L.J., added: "I also am satisfied with the decision in *Pyer v. Carter*."

In *Ellis v. Manchester Co.* (z), *White v. Bass* (a) and *Carriers' Co. v. Corbett* (b) were followed by Grove and Denman, J.J., without remark. The dicta in *Watts v. Kelson* were not quoted.

In *Wheeldon v. Burrows* (c) the question was again raised; and after full argument, the decision in *White v. Bass* (a) was expressly followed and approved by a Court of Appeal consisting of James, Baggallay, and Thesiger, L.J.J.; and *Pyer v. Carter* (d), so far as it rested upon the doctrine of implied reservation pure and simple, was declared to be overruled. In this case one Tetley was the owner of property in Derby, including a silk manufactory and some vacant land adjoining. In one of the workshops of the manufactory were some windows which opened upon the vacant land. Tetley first sold and conveyed the vacant land to the plaintiff's predecessor in title, and then sold the manufactory to the defendant. The defendant claimed for his manufactory an easement of light and air over the plaintiff's property, and argued that such an easement, as continuous and apparent, was reserved by implication upon the sale of the vacant land (e). This claim was negatived by Bacon, V.-C., who explained all the cases in which any reservation had been implied as cases of necessity, and said that in this case it was not "necessary" that the windows in the workshop should exist. The judgment of the Court of Appeal, affirming this decision, was expressed by Thesiger, L.J.

After stating the facts, the Lord Justice continued as follows: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed (f), there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the

Implied reservation (where severance) of quasi-easements.

Watts v. Kelson.

Ellis v. Manchester Co.

Wheeldon v. Burrows.

(z) 1876, 2 C. P. D. 13.

(a) 1862, 7 H. & N. 722; 31 L. J. Ex. 283; 126 R. R. 663.

(b) 1865, 2 Dr. & Sm. 355; 143 R. R. 156.

(c) 1879, 12 Ch. D. 31; 48 L. J. Ch. 853.

(d) 1857, 1 H. & N. 916; 26 L. J. Ex. 258; 108 R. R. 896.

(e) Both properties had been put up

for sale under one set of conditions, the defendant's tenement not being then sold. A point was raised on this, but was held to be untenable after conveyance executed.

(f) Clearly, the Lord Justice does not mean that these words are necessary in order to bring the case within the operation of the rule.

Implied
reservation
(where
severance)
of quasi-
easements.

*Wheldon v.
Burrows.*

grant used by the owner of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations on this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant."

His Lordship then went through the principal decisions seriatim in order to show that they illustrated these rules. He treated *Nicholas v. Chamberlain* (*g*) as probably a case of necessity, and considered *Pyer v. Carter* (*h*) as the only break in the current of authority against the doctrine of implied reservation. After dealing with the exception to the rule in cases of necessity, which is illustrated by *Pinnington v. Galland* (*i*) and *Davies v. Sear* (*k*), he continued as follows: "Upon the question whether there is any other exception I must refer both to *Pyer v. Carter* (*h*) and to *Richards v. Rose* (*l*); and although it is quite unnecessary for us to decide the point, it seems to me there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer v. Carter*; and I cannot see that there is anything unreasonable in supposing in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v.*

(*g*) 1607, Cro. Jac. 121; above, p. 116.

(*h*) 1857, 1 H. & N. 916; 26 L. J. Ex.
258; 108 R. R. 896; above, p. 155.

(*i*) 1853, 9 Exch. 1; 22 L. J. Ex.

348; 96 R. R. 508.

(*k*) 1869, 7 Eq. 427; 38 L. J. Ch. 545.

(*l*) 1853, 9 Exch. 218; 23 L. J. Ex.
3; 96 R. R. 675; above, p. 156

Carter is right or wrong comes for discussion, to consider that point. *Richards v. Rose* (m), although not identically open to exactly the same reasoning as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other: is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own? ” (n).

Implied reservation (where severance) of quasi-easements.

Wheeldon v. Burrows.

The Lord Justice concluded by distinguishing this case from *Swanborough v. Coventry* and *Compton v. Richards*, quoted above (o), which appear to constitute another exception to the rule, on the ground that here there was no simultaneous sale, the facts commencing with an absolute conveyance. James, L.J., who concurred, was disposed to treat *Nicholas v. Chamberlain* (p) as a case of parcels, the conduit being treated as a corporeal part of the house, “just as in any old city there are cellars projecting under other houses ” (q).

Wheeldon v. Burrows has been often followed (r), and must now be regarded as settled law.

But in *Russell v. Watts* (s), while the authority of *Wheeldon v. Burrows* was not questioned, the House of Lords came to the conclusion that the grantor had, in the case before them, in fact reserved an easement of support.

Russell v. Watts.

The following were the material facts:—In March, 1866, the corporation of Liverpool granted to one Jeffery seven leases of as many adjoining plots of land, subject to covenants binding him and his assigns to build on the several plots according to plans to be approved by the council of the borough, and to keep the buildings in repair. The buildings were to be connected internally so as to form one large edifice, but were to be separable at any time by closing the internal

(m) 1853, 9 Exch. 218; 23 L. J. Ex. 3; 96 R. R. 675.

(n) Cf. Cockburn, C.J., *Angus v. Dalton*, 3 Q. B. D. 116; 47 L. J. Q. B. 181.

(o) Pages 126 and 127.

(p) 1607, Cro. Jac. 121.

(q) Cf. *Francis v. Hayward*, 1882, 22 Ch. D. 177; 52 L. J. Ch. 291; *Laybourn v. Gridley*, 1892, 2 Ch. 53; 61 L. J. Ch. 352.

(r) See *Allen v. Taylor*, 1880, 16 Ch. D. 355; 50 L. J. Ch. 178; *Russell v. Watts*, 1885, 10 App. Cas. 590; 55 L. J. Ch. 158; *Watson v. Troughton*, 1883, 48 L. T. 508; *Taws v. Knowles*,

1891, 2 Q. B. 564; 60 L. J. Q. B. 641; *Howarth v. Armstrong*, 1897, 77 L. T. 62; *Union Co. v. London Co.*, 1901, 2 Ch. 300; 70 L. J. Ch. 558; on appeal, 1902, 2 Ch. 557; 71 L. J. Ch. 791; *Ray v. Hazeldine*, 1904, 2 Ch. 17; 73 L. J. Ch. 537; and the mining cases quoted below, Part III., Chap. 4, including *Lore v. Ball*, 1884, 9 App. Cas. 286; 53 L. J. Q. B. 257.

(s) 1885, 10 App. Cas. 590; 55 L. J. Ch. 158; cf. *Hayles v. Pease*, 1899, 1 Ch. 567; 68 L. J. Ch. 222; *Batten Pooll v. Kennedy*, 1907, 1 Ch. 256; 76 L. J. Ch. 162.

Implied reservation (where severance) of quasi-easements.

Russell v. Watts.

communications. The plans, as approved by the council, showed a building on one of the plots, B, divided from another plot, C, by a main wall standing on the boundary between B and C, so as to be partly in B and partly in C; and in this wall were shown windows looking out from B into a courtyard forming part of C. The plans also showed the building plot B divided from a third plot, E, by a similar wall, also situate on the boundary line between these two plots, and having windows overlooking E.

In June, 1866, the main wall with the window spaces between B and C being almost completed (*t*), Jeffery mortgaged plot C. In September, 1866, he mortgaged plot E. In December, 1866, he mortgaged plot B. In 1867 or 1868 the buildings were completed without any interference on the part of the mortgagees. Ultimately all the mortgagees foreclosed; and, the mortgagees of C and E having blocked up the windows in the dividing walls above referred to, the mortgagee of B brought this action.

Obviously, it followed from *Wheeldon v. Burrows* that, on the occasion of the mortgages of C and E, there was no implied reservation of an easement of light to the windows in question. But Bacon, V.-C., decided for the plaintiff; and his decision, reversed by the Court of Appeal, was restored by the House of Lords.

The Vice-Chancellor's judgment proceeded chiefly on the ground that the owners of C and E, having without objection permitted the dividing walls to be completed and the windows to be opened according to the plans, could not afterwards turn round and block up the windows; and Lindley, L.J., who dissented from the judgment of the majority of the Court of Appeal, apparently took the same view. But Cotton and Fry, L.JJ., who constituted the majority of the Court, pointed out that Jeffery and the mortgagees of B were under no misapprehension as to their rights, so that the doctrine of acquiescence did not apply (*u*).

The decision of the House of Lords proceeded on somewhat different grounds. As to the windows looking on to C, Lord Selborne relied upon a clause in the mortgage of June, 1866, whereby it was agreed and declared between and by the parties that Jeffery should build on the mortgaged land "such erections, buildings, and conveniences" as should in all respects correspond to the plans approved of by the surveyor to the mortgagees. The dividing wall, he said, with the windows in question, was, as to part of its thickness, to be erected on C; and, as to this part, Jeffery was entitled to the benefit of

(*t*) Per Lord Selborne, 10 App. Cas at p. 600; *contrà*, the statement in 25

Ch. D. at p. 564.

(*u*) Above, p. 66.

the agreement. The mortgagees of C had therefore agreed that a part of the outer wall of house B might stand within the verge of C, and should have in it particular windows opening upon and overlooking C; and they could not now obstruct these windows. He also thought that the principle of the cases (*x*) upon covenants between vendors and purchasers as to general plans of building was applicable.

Implied reservation (where severance) of quasi-easements. *Russell v. Watts*.

In the mortgage of E the mutual covenants above referred to were not found; but it recited the lease to Jeffery, and assigned the buildings "then standing and being or in course of erection" upon the land. The mortgagee thus became lessee by assignment of the lease and buildings in statu quo, with notice (as from the facts his Lordship inferred) of the general plan on which they had been built, on the footing of which all Jeffery's expenditure had been made, and in which both the corporation, as lessees of the estate, and Jeffery, as lessee of the premises demised by the other leases, were interested. The mortgagee could not under these circumstances interfere with the masonry of the wall which crossed his boundary; and, if restricted so far, he was restricted also as to the lights in the wall.

Lord Fitzgerald agreed with Lord Selborne, and laid stress on the "common interdependent design" to be gathered from the plans.

Lord Blackburn, who dissented, differed from Lord Selborne as to the construction of the covenant above referred to.

The case rested on very special circumstances, which are scarcely likely to occur again.

The same observation perhaps applies to *Thomas v. Owen* (*y*). There the plaintiff and defendant were yearly tenants of adjoining farms under one landlord; and a made and fenced lane ran over the defendant's farm and led to the farm occupied by the plaintiff. In 1873 the defendant's farm was demised to him for a term, the area of the lane being included in the demise and no right of way over it being expressly reserved. In 1878 the landlord demised to the plaintiff the farm occupied by him with the "appurtenances thereto belonging." A contest having arisen, it was held that the plaintiff had a right of way over the lane. The Court relied on the fact that at the date of the lease of 1873 the plaintiff had a yearly tenancy of his farm with an implied right to use the lane as a road

Thomas v. Owen.

(*x*) *Whatman v. Gibson*, 1839, 9 Sim. 196; 7 L. J. (N. S.) Ch. 160; 47 R. R. 214; *Coles v. Sims*, 1853, Kay, 56; 23 L. J. Ch. 258; *Child v. Douglas*, 1854, Kay, 560; 101 R. R. 736.

(*y*) 1887, 20 Q. B. D. 225; 57 L. J. Q. B. 198. It does not appear by the report that *Wheeldon v. Burrows* was cited, but doubtless it was present to the minds of the Court.

Implied
reservation
(where
severance)
of quasi-
easements.
Thomas v.
Owen.
Civil law.

"subsisting visibly for the convenience of the plaintiff's farm," and they apparently took the view that in order to support this right a reservation from the defendant's lease must be implied; and that not only during the continuance of the plaintiff's yearly tenancy, but during the whole term of the defendant's lease (z).

The current of authority in the civil law is in favour of the position, that all servitudes, indiscriminately, were extinguished by unity of ownership, and that none were revived by a subsequent severance, except possibly those of necessity (a). And, although it was competent to the owner of two tenements, on alienating one of them, to impose a servitude upon it, for the benefit of the one he still retained, or vice versâ (b), and such imposition, even though, in terms, binding on the person of the possessor only, would, nevertheless, bind the servient tenement into whosoever hands the two tenements respectively might pass (c); yet, unless the precise nature of the servitude was specified upon alienation, no obligation whatever was imposed. The general expression, "*quibus est servitus utique est*," was binding as to strangers only; and even the general reservation, that the alienated tenement "should be servient," appears to have been insufficient to prevent the vendee from disturbing the servitudes of his vendor.

It would appear, however, that the insertion of the clause, "*quibus est servitus utique est*," would, in such a case, prevent the purchaser

(z) Compare *Coutts v. Gorham*, cited above, p. 124. If the principle applied in that case had been applied here, the plaintiff would have failed, the landlord not having reserved the right of way on granting the lease of 1873, and the plaintiff taking his lease in 1878 out of the reversion which the landlord then had. See *Gordon v. Ogilvie*, 1899, 15 Times L. R. 239.

(a) Marcellus respondit, qui binas aedes habebat, si alteras legavit, non dubium est quin hæres (alias) possit altius tollendo obscurare lumina legatarum aedium. Non autem (semper) simile est itineris argumentum; quia sine accessu nullum est fructus legatum: habitare autem potest et aedibus obscuratis.—Dig. 8, 2, 10, de serv. præd. urb.

Sed ita officere luminibus et obscurare legatas aedes conceditur ut non penitus lumen recludatur, sed tantum relinquatur quantum sufficit in usus diurni moderatione.—Ib.

(b) Duorum prædiorum dominus, si alterum eâ lege tibi dederit, ut id prædium, quod datur, serviat ei quod ipse

retinet, vel contrâ: jure imposita servitus intelligitur.—Dig. 8, 4, 3, comm. præd.

(c) Cum fundo, quem ex duobus retinuit venditor, aquæ ducendæ servitus imposita sit, empto prædio quasita servitus distractum denuo prædium sequitur; nec ad rem pertinet, quod stipulatio, qua pœnam promitti placuit, ad personam emptoris, si ei forte frui non licuisset, relata est.—Dig. 8, 3, 36, de serv. præd. rust.

In tradendis unis aedibus ab eo qui binas habet, species servitutis exprimenda est: ne si generaliter servire dictum erit, aut nihil valeat quia incertum sit quæ servitus excepta sit, aut omnis servitus imponi debeat.—Dig. 8, 4, 7, comm. præd.

Si cum duas haberem insulas duobus eodem momento tradidero, videndum est, an servitus alterutris imposita valeat: quia alienis quidem aedibus nec imponi nec acquiri servitus potest; sed, ante traditionem peractam suis magis acquirit vel imponit is qui tradit, ideoque valebit servitus.—Dig. 8, 4, 8, 1b.

of one tenement from disturbing a manifestly existing servitude of the other, supposing the owner to alienate both at the same time (*d*). On the other hand, there is one passage in the Digest which distinctly recognizes the principle of the disposition by the owner of two tenements (*e*).

Implied reservation (where severance) of quasi-easements. Civil law.

SECT. 2.—*Easements of Necessity.*

Another class of easements acquired by implied grant are those which are usually termed "Easements of Necessity," though they might with more correctness be called Easements incident to some act of the owners of the dominant and servient tenements, without which the intention of the parties to the severance cannot be carried into effect (*f*).

Nature of easements of necessity.

The easement called a Way of Necessity is, in reality, only a single species of this class, and is necessary "only in a partial sense, as being a necessary incident" (*g*) to the instrument creating the estate to which the easement is appendant.

Ways of necessity, of a different kind, are mentioned by Dodderidge, J., in *Shury v. Pigott* (*h*),—ways "to the church or to market" (*i*).

Under this head, likewise, come easements incident to the rights which a party has in virtue of his office, as a right of entry in the parson to take away his tithes: *Payne v. Brigham* (*k*); and also a right to make the grass into hay on the land where it grew (*l*).

(*d*) Quidquid venditor servitutis nomine sibi recipere vult, nominatim recipi oportet. Nam illa generalis receptio, "quibus est servitus utique est," ad extraneos pertinet, ipsi nihil prospicit venditori ad jura ejus conservanda: nulla enim habuit: quia nemo ipse sibi servitutem debet: quinimo, et si debita fuit servitus, deinde dominium rei servientis pervenit ad me, consequenter dicitur extingui servitutem.—Dig. 8, 4, 10, comm. præd.

(*e*) Binas quis ædes habebat unâ contiguatione tectas; utrasque diversis legavit. Dixi—ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, jus non esse immisum habere. Nec interest, purè utrisque, an sub conditione alteri ædes legatæ sint.—Dig. 8, 2, 36, de serv. præd. urb.; and see the Dutch "Consultation," 2 Deel, casus 145.

(*f*) In view of the above explanation of the term, it would appear to be hardly necessary to state that the owner of a tenement has no right of access

thereto over lands of his neighbour, merely because he has no other means of access. There is, however, an express decision of the Court of Session to this effect (*Menzies v. Breadalbane* (No. 2), 4 F. 59; *Mews' Digest*, 1902, col. 94). In order to found a claim to an easement of necessity, unity of ownership of the dominant and servient tenements at some time is essential, as in the absence of such unity no grant can be implied.

(*g*) 1 Wms. Saund. 323 a, n.; 1 Notes to Saund. 570.

(*h*) 1625, 3 Bulstrode, 340.

(*i*) These are not strictly easements, but customary rights; see above, p. 4.

(*k*) 1685, 2 Lutw. 1313. Cf. *Wiseman v. Denham*, 1623, Palmer, 341; *Shapcott v. Muффord*, 1697, 1 Ld. Raym. 187; *South v. Jones*, 1720, 1 Strange, 245; 1 Rolle Rep. 172, 420; 1 Rolle Abr. 109, action on the case, N., pl. 36. In *James v. Dods*, 1834, 2 C. & M. 266; 3 L. J. Ex. 47, the Court of Exchequer

(*l*) For note (*l*) see p. 168.

Easements of necessity.

Ways of necessity described—
by Rolle;

Easements called Ways of Necessity are thus described in Rolle's Abridgment—

“If I have a field enclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.

“And the grantor shall assign the way where he can best spare it.

“So, too, if the close aliened be not entirely enclosed by my land, but partly by the land of strangers; for he cannot go over the land of strangers. Quare” (*m*).

The chapter of Rolle in which these sections occur is headed, “In what case one thing shall pass by grant of another—Incidents”—and the first pl. is, “The grant of a thing passes everything included therein, without which the thing granted could not be had”: pl. 16 is, “If a man grant or reserve wood, that implies liberty to take and carry it away”; thus evidently treating it as a necessary implication of the intention of the grantor, as in the case of all other incidents which the law attaches to grants.

by Serjeant Williams.

The general rule is thus stated by Serjeant Williams: “Where a man having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself” (*n*).

Doctrine applied to titles arising by grant or reservation.

A way of necessity accordingly is a way implied in favour of a grantee of lands over the land of the grantor where land-locked land is granted, or again in favour of the grantor of land over the land of the grantee where land-locked land is retained. In the former case the easement arises by implied grant. In the latter case it arises by implied reservation, which takes effect as a re-grant (*o*).

The doctrine is only applied to a title arising by grant personal or parliamentary (*p*), and does not apply where the title to the dominant

held that a rector, though entitled to the use of whatever roads existed on the farm for the purpose of carrying away his tithes, had no right except by express grant or prescription to prevent the occupier from making such alterations as were advantageous to his land, though the accustomed road was thereby stopped up, provided such alterations were made *bonâ fide* and not with any vexatious intention towards the title owner.

(*l*) 1 Rolle Abr., Dismes, X., pl. 3

(*m*) 2 Rolle Abr., tit. Graunt, Z., pl.

17, 18; 1 Wms. Saund. 570; Vin. Abr., Grantz, Z., pl. 17, 18. For the implication, it is sufficient if the close aliened be partly enclosed by the grantor's land, and partly by the land of strangers. See *Gayford v. Moffatt*, 1868, 4 Ch. 133.

(*n*) 1 Wms. Saund. 570, recognized *Pinnington v. Galland*, 1853, 9 Exch. 12; 22 L. J. Ex. 348; 96 R. R. 508.

(*o*) *London v. Riggs*, 1880, 13 Ch. D. 798; 49 L. J. Ch. 297. See p. 170, note (*d*), and p. 171.

(*p*) *Wilkes v. Greenway*, 1890, 6 T. L. R. 449.

tenement has been acquired under the Statutes of Limitation (*g*) or by escheat (*r*). Easements of necessity.

It will be seen from the statement of Serjeant Williams that the implication arises upon a grant in fee or for life or for years (*s*). It may also arise upon a disposition by will (*t*).

It would seem from an observation of Mansfield, C.J., in *Morris v. Edgington* (*u*), that, although in these cases there might exist some other mode of access, yet, if the way claimed "was necessary for the most convenient enjoyment" of the thing demised, it would be a way of necessity. This doctrine, however, seems foreign to the principle on which the right to ways of necessity is supported; and appears to be only another way of stating the doctrine of the disposition of the owner of two tenements, treated of in the preceding sections of this chapter. The rule established by recent decisions is that "an easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property" (*x*). So in an earlier case, where at the time of the grant in respect of which a right of way was claimed there was another way which continued to exist, a second way could not be claimed as a way of necessity on the ground of its being more convenient than the former way (*y*). Again, a claim to a way of necessity was refused where one side of the land granted abutted on a highway twenty feet below it (*z*). The implication of a grant is limited by the necessity of the case. And no grant will be implied where at the time the necessity did not exist (*a*). Doctrine based on necessity, not on convenience.

In *Dand v. Kingscote* (*b*) it was held, that under an exception of all seams of coal, and a reservation of right to dig pits for getting such coal, all things that were dependent on that right and necessary for the obtaining it were reserved also, according to the rule in *Sheppard's Touchstone*, p. 100; and that, consequently, the coal-owner had, as incident to the liberty to dig pits, the right to fix *Dand v. Kingscote.*

(*g*) *Wilkes v. Greenway*, sup.

(*r*) *Proctor v. Hodgson*, 1855, 10 Exch. 828; 24 L. J. Ex. 195; 102 R. R. 852.

(*s*) See the leases stated in *Gayford v. Moffatt*, 1868, 4 Ch. 133; *Miller v. Hancock*, 1893, 2 Q. B. 180, where a grant of the right to use the staircase of a building was implied in a lease of an upper flat.

(*t*) See *Phycsy v. Vicary*, 1847, 16 M. & W. 484; 73 R. R. 583; *Pearson v. Spencer*, 1863, 3 B. & S. 761.

(*u*) 1810, 3 Taunt. 28; 12 R. R. 579.

Cf. some observations of Bowen, L.J., in *Bayley v. Great Western R.*, 1884, 26 Ch. D. at p. 453.

(*x*) Per Stirling, L.J., *Union Co. v. London Co.*, 1902, 2 Ch. 557, 573; 70 L. J. Ch. 558; followed in *Ray v. Hazeldine*, 1904, 2 Ch. 17; 73 L. J. Ch. 537.

(*y*) *Dodd v. Burchell*, 1862, 1 H. & C. 113; 31 L. J. Ex. 364; 130 R. R. 410.

(*z*) *Titchmarsh v. Royston Co.*, 1899, W. N. 256; 81 L. T. 673.

(*a*) *Midland R. Co. v. Miles*, 1886, 33 Ch. D. 644; 55 L. J. Ch. 745.

(*b*) For note (*b*) see p. 170.

Easements of necessity. such machinery as would be necessary to drain the mines, and draw the coals from the pits.

Dand v. Kingscote.

Liford's Case.

So, in *Liford's Case* (c), where a lessor excepted all trees of a certain age growing on the estate demised, and the lessee brought an action of trespass against certain parties claiming under the lessor, for entering upon the lands to see the condition of the trees, it was resolved by the whole Court, that, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power, as incident to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them; as in 9 H. 6, 29 b, a man seised of a house in a borough, &c., devisable, devised it to a woman in tail, and, if the woman died without issue, that his executor might sell and dispose of it for his soul; in that case the executor might, by the law, enter into the house to see if it was well repaired or not, to the intent to know at what value the reversion is to be sold. Quod fuit concessum per totam curiam. The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit on the land of another to enter into the land to mend it, when occasion requires; as it is resolved 9 E. 4, 35 a. So it is agreed in 2 R. 2, Bar. f. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood. Lex est, cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit; and this is a maxim in law."

The above authorities show that the implication of an easement of necessity arises as well in the case of a reservation as of a grant (d).

Darcy v. Askwith.

In *Darcy v. Askwith* (e), where an action of waste was brought against the defendant for felling oak trees, the only question was—whether the lessor by leasing coal mines did, by implication of law, give power to the lessee to fell timber for the use of the coal mines.

(b) 1840, 6 M. & W. 174; 55 R. R. 560; 9 L. J. (N. S.) Ex. 279. See further as to subsidiary rights of this kind, Part IV., Chap. 1; and as to the rights granted or reserved to mine-owners, *Cardigan v. Armitage*, 1823, 2 B. & C. 197; 26 R. R. 313; *Proud v. Bates*, 1865, 34 L. J. Ch. 406; 146 R. R. 672; *Ramsay v. Blair*, 1876, 1 App. Cas. 701; (cf. *Batten Pooll v. Kennedy*, 1907, 1 Ch. 256; 76 L. J. Ch. 162. As to support, see below, Part III., Chap. 4.

(c) 1615, 11 Rep. 52. See also *Foster v. Spooner*, 1583, Cro. Eliz. 17;

Hodgson v. Field, 1826, 7 East, 613; 8 R. R. 701; *Hewitt v. Isham*, 1851, 21 L. J. (N. S.) Ex. 35.

(d) *Pinnington v. Galland*, 1853, 9 Exch. 1; 22 L. J. Ex. 348; 96 R. R. 508; cf. *Wheeldon v. Burrows*, 1879, 12 Ch. D. 57; 48 L. J. Ch. 853; *Midland R. v. Miles*, 1886, 33 Ch. D. 644; 55 L. J. Ch. 745; and the judgments in *Union Co. v. London Co.*, 1902, 2 Ch. 557; 70 L. J. Ch. 558; *Ray v. Hazeldine*, 1904, 2 Ch. 17; 73 L. J. Ch. 537.

(e) 1618, Hobart, 234.

It was agreed that the grant of a thing did carry all things included, without which the thing granted could not be had. But this case was adjudged *unâ voce* against the defendant; for it must be understood of things incident and directly necessary. Thus, if I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the waters dry. If I grant or reserve woods, it implies a liberty to take and carry them away.

Easements of necessity.
Darcy v. Ashwith.

In an anonymous case (f), it is said, *per curiam*: "If a man, either by grant or prescription, have a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it."

And again, in *Reg. v. Cluworth* (g), by Holt, C.J.: "If one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by brink of water over that land, or farther in, if necessary."

Reg. v. Cluworth.

This general right to tow along the banks of navigable rivers is denied in *Ball v. Herbert* (h) unless founded either on statute or custom.

It is clear that a way of necessity may arise by implied reservation. Thus, if the owner of four closes having no way to one of them but over the others grant the latter without reserving a right of way, it will be reserved to him by operation of law (i). On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication (k).

Implied reservation.

In *Jorden v. Atwood* (l) the defendant was seised of a messuage which had a way appendant to it over a certain close. It appears to be admitted in the argument that there was no other way to the house. This close the defendant bought, and afterwards enfeoffed the plaintiff thereof, making no reservation of the way; and the present action was brought for the defendant continuing to use the way. The judges differed in opinion, some holding that the way was not extinguished; others, that it was the defendant's own folly not to have reserved it; but judgment was given for the defendant. But it is stated in 2 Sid. 111 that, on searching the roll in this case, it was found that judgment was given for the plaintiff.

Jorden v. Atwood.

(f) 1705, 6 Mod. 149.

(g) 1705, 6 Mod. 163.

(h) 1789, 3 T. R. 253; 1 R. R. 695.

See *Lee Conservators v. Button*, 1881, 6 App. Cas. 685; 51 L. J. Ch. 17.

(i) *Clark v. Cogge*, 1607, Cro. Jac. 170; *Jorden v. Atwood*, 1606, Owen,

121; *London v. Riggs*, 1880, 13 Ch. D. 798; 49 L. J. Ch. 297.

(k) *Davies v. Scar*, 1869, 7 Eq. 427; 38 L. J. Ch. 545.

(l) 1606, Owen, 121. See Rol. Abr. and Vin. Abr., Extinguishment, C., pl. 8, 10, 11; Vin. Abr., Common, E. a, pl. 16.

Easements of
necessity.
Packer v.
Welsted.

In *Packer v. Welsted* (*m*) there was a special verdict, finding that there were three parcels of land, and the necessary and private way was out of the first into the second, and out of the two first into the third parcel. J. S. purchased the three parcels, and then aliened the two first to J. N.; and the question was, if he should have a way over the two first parcels to his third parcel. The jurors also found that the alienation was by feoffment, and that there was no other way to come at the land not aliened but over the other land. After two arguments, the Court gave judgment for the defendant, "that he might take a convenient way without permission (*sans le gree*) of the plaintiff and the law would then adjudge whether such way were convenient and sufficient or otherwise." Glyn, C.J., observed "That it could not properly be called a right of way (before the alienation), because no man could have such right in his own soil; but that as the jurors had found the way to be of necessity, it would remain, for it would be not only a private inconvenience, but also to the prejudice of the public weal, that the land should be fresh and unoccupied."

Dutton v.
Taylor.

In *Dutton v. Taylor* (*n*), which was an action of trespass q. c. f., the defendant justified as tenant to one R. Cleadon, who was seised simul et semel of two closes, the only road to the second from an ancient highway being across the first close; this latter close Cleadon sold to one Astbury, but still continued to use the way across it, although there was no reservation of any right of way in the deed of conveyance. It was objected, the law would not imply any reservation by the vendor where none was expressed, *sed non allocatur*. "For it is apparent by the plea, that it is a way of necessity, and it is *pro bono publico* that the land should not be unoccupied."

Howton v.
Frearson.

In *Howton v. Frearson* (*o*) the Court held that a way of necessity over the grantor's land would equally be implied as incident to a grant, though the granting party was a trustee; but Lord Kenyon expressed doubts as to the correctness of the general principle laid down in the case above cited.

Clark v.
Cogge.

In *Clark v. Cogge* (*p*), upon demurrer, the case was: "The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining, and whether this was a lawful claim was the question; and resolved without argument, that the way remained,

(*m*) 1657, 2 Siderfin, 39—111.
(*n*) 1791, 2 Lut. 1487; *Buckby v.*
Coles, 1814, 5 Taunt. 311; 15 R. R.

508.
(*o*) 1798, 8 T. R. 50; 4 R. R. 581.
(*p*) 1607, Cro. Jac. 170.

and that he might well justify the using thereof, because it is a thing of necessity ; for otherwise he could not have any profit of his land. Et e converso —If a man hath four closes lying together and sells three of them, reserving the middle close, and hath not any land thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law : and there is not any extinguishment of a way by having both lands.”

Easements of necessity.

Clark v.

Cogge.

The concluding observation evidently refers to the kind of way here spoken of—a way of necessity ; but whether it does or not is immaterial to the authority of the case, which did not turn upon any question of extinguishment, but upon the new title implied by law.

In *Pinnington v. Galland* (q) the owner of two closes, one of which was only accessible over the other, conveyed the former to A., the latter to B., and it did not appear which conveyance was first executed, but the conveyance to A. contained the words “ with all ways belonging or appertaining.” The Court held that, whichever was first conveyed, A. had a way over B.’s close ; for, if the conveyance to A. was first, A. would have a way of necessity by implied grant, and if the conveyance to B. was first, then the owner of the remaining close would have had a way of necessity by implied reservation, which, upon the conveyance to A., passed to him by the words all ways appertaining, or, indeed, as the Court suggested, without those words,—and this for the same reason which originally created it, that the way was necessary to the enjoyment of the land granted, and therefore would pass without express words ; and, these two things concurring, the grantee would have the way upon the principle of the maxim, “ Cuicumque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit,” just as if the grantor of the land were owner of the adjacent land, instead of being only the owner of a way over it.

Pinnington v.
Galland.

In *Davies v. Sear* (r) land was sold to a purchaser who had notice that the adjoining land was to be laid out in building in a manner which would make a way over the purchased land necessary to the vendor. This right of way was held to have been reserved to the vendor by implication. The way was not actually necessary at the date of the severance, as there was other access to the premises retained ; but the grantee had notice that the grantors were bound, under an existing contract, to stop up this other approach, so as to

Davies v.
Sear.

(q) 1853, 9 Exch. 1 ; 22 L. J. Ex. 348 ; 96 R. R. 508.

(r) 1869, 7 Eq. 427 ; 38 L. J. Ch. 545 ;

above, p. 146 ; cf. *Gayford v. Moffatt*, 1868, 4 Ch. 133.

Easements of necessity.
Davies v. Scar.

leave no access except by the way claimed. Lord Romilly treated the case as one of necessity ; but there were other grounds for his decision.

Extent of the right.

The accessorial right which the law thus confers is to be measured by the nature of the grant or reservation to which it is incident (*s*). As illustrating the question of the extent of the right *London v. Riggs* (*t*) may be quoted. There the owner of a close surrounded by his own land, and theretofore used only as agricultural land, having granted away the surrounding land and reserved the close, claimed a way of necessity for all purposes over the surrounding land. Jessel, M.R., held that he was entitled to a way for agricultural purposes only. He thought that the implied reservation operated by way of re-grant, and that the re-grant was limited by the necessity which created it. *Ray v. Hazeldine* (*u*) is to the same effect. In *Serff v. Acton Board* (*x*), where land was taken by a local board under its compulsory powers for the purpose of sewage works, the necessary right of way was held to extend to all purposes for which it could be required for sewage works. Similarly it has been held that the lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made over an outer close which belongs to the same landlord (*y*).

Duration of the right.

The question of the duration of the right has been discussed in several cases ; and it has been held to cease, when it is no longer required in order to render the grant or reservation effectual.

Holmes v. Goring.

In *Holmes v. Goring* (*z*) the defendant, having been previously entitled to a way of necessity to Blackacre over certain closes, purchased these closes, together with certain other pieces of land adjoining Blackacre : he subsequently sold a close (now occupied by the plaintiff) over which the way of necessity had been used, together with some portions of the land adjoining, which prevented his having access over his own land to Blackacre. These portions had, however, been repurchased by him long before the present action was brought, at which time he could have had as convenient access over his own land as over that occupied by the plaintiff. The question to be decided was, whether the way of necessity—which

(*s*) See *Dand v. Kingscote*, 1840, 6 M. & W. 174 ; 9 L. J. (N. S.) Ex. 279 ; 55 R. R. 560.

(*t*) 1880, 13 Ch. D. 798 ; 49 L. J. Ch. 297.

(*u*) 1904, 2 Ch. 17 ; 73 L. J. Ch. 537.

(*x*) 1886, 31 Ch. D. 679 ; 55 L. J. Ch. 569.

(*y*) *Gayford v. Moffatt*, 1868, 4 Ch. 133.

(*z*) 1824, 2 Bing. 76 ; S. C., 9 Moore, 166 ; 2 L. J. C. P. 134 ; 27 R. R. 549.

was admitted to have existed when the defendant sold the close now occupied by the plaintiff—was defeated by the fact that, by a subsequent purchase, he was enabled to approach Blackacre over his own land, the defendant contending that the necessity of the way was to be considered with reference to the condition of the property at the time of the sale of the close.

Easements of necessity.
Holmes v. Goring.

The Court held that the way of necessity ceased as soon as the defendant had any other means of access to the close to which it led. "A way of necessity," said Best, C.J. (citing Serjeant Williams' note to Saunders), "when the nature of it is considered, will be found to be nothing else than a way by grant; but a grant of no more than the circumstances which raise the implication of necessity require should pass (*a*). If it were otherwise, this inconvenience might follow, that a party might retain a way over one thousand yards of another's land, when, by a subsequent purchase, he might reach his destination by passing over one hundred yards of his own. A grant, therefore, arising out of the implication of necessity cannot be carried further than the necessity of the case requires, and this principle consists with all the cases which have been decided." Park, J., added: "From all the authorities referred to, it is clear that when a way is claimed by necessity, it is a good answer to show that there is another way which the party may use." Burrough, J., expressed his opinion to be "That there must be a necessity continuing up to the time of the trespass justified under it."

The opinion here expressed by Burrough, J., appears to be in accordance with the decision of the Court of King's Bench in *Reignolds v. Edwards* (*b*). The defendant's lessor had a prescriptive right of way over the plaintiff's land to a close which was encircled by land of the plaintiff. Twenty-four years before the action was brought the plaintiff stopped up the old way and opened a different one, which latter, after being used by the defendant's lessor during that period, the plaintiff also stopped up, and brought the present action of trespass for the use of it by the defendant, and his removal of a gate erected across it by the plaintiff. The Court held that the new way could not be claimed as a way of necessity, as it did not appear "that there was no other way, but only that there was no other passage open"; and that, as the plea set forth a right of way by prescription, which the plaintiff had admitted by demurring to the plea, that was sufficient to prevent the defendant being entitled

Reignolds v. Edwards.

(*a*) Cf. *Macnaghten v. Baird*, 1903, 2 I. R. 731; *Midland R. Co. v. Miles*, 1886, 33 Ch. D. 614; 55 L. J. Ch. 745.
(*b*) 1742, Willes, 282.

Easements of necessity.
Reynolds v. Edwards.

to this as a way of necessity ; that it was, in fact, but a way of sufferance, and upon the plaintiff determining his will by erecting the gate the defendant should have had recourse to his old right.

Buckby v. Coles.

The case of *Buckby v. Coles* (c) appears from the facts as stated in the report to be somewhat at variance with the doctrine above laid down, as, during the time in which there was a unity of the whole property, there appeared to have been another approach to Blackacre besides the previously existing way of necessity ; and, as this new approach existed at the time of severance, the former necessity must, of course, have ceased. There appears, however, to be some confusion in the facts, as the jury expressly found, that, at the time of the trespass for which the action was brought, there existed no other way but the one claimed by the defendant. Dallas, J., said : “ The question on the issue is, whether there was any other way ? The evidence on the defendant’s side is, that there was no other way. The plaintiff meets it by evidence that there was another way, though not quite so convenient ; and the jury have had it before them, and have disaffirmed the existence of any other way.” This case is therefore, in fact, not inconsistent with *Holmes v. Goring*, above cited.

Proctor v. Hodgson.

The decision in *Proctor v. Hodgson* (d) turned upon a point of pleading. But, in the course of the argument, Parke, B., said : “ The extent of the authority of *Holmes v. Goring* is that, admitting a grant in general terms, it may be construed to be a grant of such a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at the time the Court was wrong ; but that is not the question now.” And Alderson, B., added : “ Probably, if this case be taken to a court of error, *Holmes v. Goring* will be reviewed.”

Barkshire v. Grubb.

Again, in the course of the argument in *Barkshire v. Grubb* (e), Fry, J., being referred to *Holmes v. Goring* and *Proctor v. Hodgson*, said : “ I thought that the necessity must be judged of at the date of the conveyance ; but the proposition laid down in *Holmes v. Goring* seems to have been only a dictum, for there appears to have been no necessity at the date of the grant.” Some of the grounds of the decision in this case seem to be inconsistent with the principle laid down in *Holmes v. Goring*.

(c) 1814, 5 Taunt. 311 ; 15 R. R. 508.

(e) 1881, 18 Ch. D. 616 ; 50 L. J. Ch.

(d) 1855, 10 Exch. 824 ; 2 L. J. Ex.
 195 ; 102 R. R. 852.

731 ; above, p. 99.

Holmes v. Goring, therefore, though never overruled, must be looked upon as of doubtful authority (f). Easements of necessity.

In the cases already cited the expression occurs that ways of convenience are extinguished by unity of ownership, but ways of necessity are not. It appears, however, to be more correct, as well as more in accordance with the general principles of the law of easements, as recognized both by the English and civil law, to consider all easements, whether of convenience or necessity, as extinguished by unity; but that, upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are impliedly granted anew in the same manner as any other easement which would be held by law to pass as incident to the grant. Had there been a unity from time immemorial, the law would clearly imply a right of way as incident to a grant, if there existed no other means of such grant taking effect. Why, then, should this anomaly of non-extinguishment be held to be law, when the same result can be obtained from the ordinary principles regulating other easements of the same class?

In none of the numerous cases, in which the question of extinguishment has been discussed, has it been laid down that the *same* right revived upon the severance of the tenements which existed previous to the unity. The utmost extent to which the judges go is to say that *a* right of way revives, because the new grant would otherwise be inoperative. Where a party died seised of certain lands and a mill, which descended to his two daughters as coparceners, it was held that an agreement by parol between them, on making partition, that a way should be used to the mill as during the lifetime of their father was binding on them (g). Brooke, in his Abridgment (h), says: "The way is revived; tamen videtur that it is a new way (nouvel chimine)."

It is clearly settled, on all the authorities, that, *during the unity*, no way or easement can *exist* in the land (i).

The language of Best, C.J., in *Holmes v. Goring* (k) fully supports the doctrine above stated, that all ways are extinguished by unity of ownership; and that ways of necessity are in reality new easements incident to the grant or reservation. "If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those

(f) See and consider *London v. Riggs*, 1880, 13 Ch. D. 798; 49 L. J. Ch. 297.

(g) 21 Edw. 3, 2; S. C., 21 Ass. pl. 1.

(h) Tit. Extinguishment, pl. 15.

(i) *Morris v. Edgington*, 1810, 3 Taunt. 24; 12 R. R. 579.

(k) 1824, 2 Bing. 83; 2 L. J. C. P. 134; 27 R. R. 549.

Easements of which I retain. But what right? The same as existed before? necessity.

No; *the old right is extinguished*, and the new way arises out of the necessity of the thing. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way; but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity."

Serjeant Williams (*l*) says: "Where a man, having a close surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant. What way is it the grantee shall have? Not the old, but a new way, limited by the necessity." In *Clark v. Cogge* (*m*) the Court says, that "although the grantor in such a case reserve not a way, it shall be reserved for him by law; that is, not the old way, but a new way of necessity, if he hath not any other way." In *Jorden v. Atwood* (*n*) Popham, C.J., says: "If a man has three fields adjoining, and makes a feoffment of the middle field, the feoffee shall have a way (not the way) to this through the other close."

Direction of way of necessity.

With regard to the direction of the way of necessity, questions have been raised as to the person in whom the right to select or define the way is vested. As to this a rule has been laid down in a modern case applicable both to the case where the land-locked land is granted, and also to the case where the land-locked land is retained, by the person who was originally the common owner of the two tenements. It has been held that in both these cases the right of selection is in the common owner (*o*). The way selected, however, must be a convenient way (*p*).

Again, it has been laid down that a way of necessity once created must remain the same way as long as it continues at all, and cannot be altered by the original creator (*q*).

The earlier authorities on the above points were stated and discussed in the former editions of the present treatise as follows. In *Packer v. Welsted* (*r*), "defendant (who claimed a way of necessity by implied reservation upon a grant by him) poet prender

(*l*) 1 Wms. Saund. 323, n.; 1 Notes to Saund. 370.

(*m*) 1607, Cro. Jac. 170.

(*n*) 1606, Owen, 121.

(*o*) *Bolton v. B.*, 1879, 11 Ch. D. 972; 48 L. J. Ch. 467; see *Pearson v. Spencer*, 1861, 1 B. & S. 585; 124 R. R. 656.

(*p*) *Bolton v. B.*; *Pearson v. Spencer*, ubi sup.

(*q*) *Pearson v. Spencer*, sup.; *Deacon v. S. E. R. Co.*, 1889, 61 L. T. R. 377.

(*r*) 1657, 2 Sid. 111, already cited by the learned author.

un convenient chemin sans le gree del plaintiff, et ley poet puis adjudg si ceo soit convenient et sufficient vel plus ou nemy." And this accords with the decision of the Court of Exchequer in *Pinnington v. Galland (s)*, where it is laid down that the way would be "the most direct and convenient one." So that the grantee of the way would be allowed to take his way, subject only to the restriction that it should be the most direct and convenient one (*l*). Again, Mansfield, C.J., appears to have been of opinion that a party entitled to a way of necessity might take that which was most convenient for the enjoyment of the premises demised to him (*u*). On the other hand, in 2 Rolle Abr., Graunt, Z. 17, it is laid down: "Peffor assignera le chemin lou il poet melius ceo spare."

Easements of necessity.

Direction of way of necessity.

In *Pearson v. Spencer (x)* it seems to have been held that where the severance creating the necessity took place by will, and during the testator's lifetime and at his death the premises were in the hands of a tenant, and there was an existing way by which the tenant used and enjoyed them, the will must be considered as granting the use of that way, although it extended over a part of the dominant tenement which might have been avoided by making a gap in a fence (*y*). The Court appears to have been disposed to reconcile the passages in *Siderfin* and *Rolle*, upon the ground that the way may be assigned in the first instance in all cases by the person whose grant gives rise to the necessity, and in *Pucker v. Welsted* it was under the grant of the defendant, who retained a land-locked tenement, that the necessity arose.

The rule that a grantor of land to which there is no access, except over other land of his, may in the first instance and once for all assign a reasonable way would be intelligible enough. For in such case the way arises by implied grant, and the law only allows any way because there is no other; and this reason might fairly be held not to operate if the owner, at the time of the grant, sets out a convenient way. On the other hand, where the way arises by implied reservation (i.e., in cases where the grantor retains the land-locked tenement), it would be contrary to this reason to deprive the owner of the land, over which the way of necessity is claimed, of a similar privilege. It may be argued that the authorities are not to be

(s) 1853, 9 Exch. 1; 22 L. J. Ex. 348; 96 R. R. 508.

(t) Cf. Co. Litt. 145 a: "In case an election be given of two severall things, alwaies he which is the first agent, and which ought to do the first act, shall have the election" (quoted by James, V.-C., in *Rumble v. Heygate*, 1870, 18

W. R. 749).

(u) *Morris v. Edgington*, 1810, 3 Taunt. 24; 12 R. R. 579. See also *Abson v. Fenton*, 1823, 1 B. & C. 195; 1 L. J. (O. S.) K. B. 94.

(x) 1863, 1 B. & S. 571; affd. 3 B. & S. 761.

(y) Cf. Dig. 8, 2, 10.

Easements of necessity. Direction of way of necessity. reconciled on the ground pointed out in *Pearson v. Spencer*, that in both an opportunity of setting out the way was allowed to the person under whose grant the way was created, the way in one being by implied grant, in the other by implied reservation (z); but upon the ground that the power which the owner of the way, whether by grant or reservation, has to choose a convenient way, is subject to this, that the owner of the land over which it is claimed may, if he does so at once and once for all, set out any convenient way.

In the judgment of Kay, J., in *Brown v. Alabaster* (a) the following passage occurs: "Now, as a way of necessity, I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor, and it is quite clear that the grantor has a right himself to elect in which line, in which course, the way of necessity should go. Here there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to show it is not a way of necessity." It is conceived, however, that this statement cannot be taken quite literally, but must be subject to some qualification in respect of the reasonableness of the way assigned, and the circumstances of the case. See as to the above-quoted passage the remarks of Kekewich, J., in *Titchmarsh v. Royston* (b).

(z) For an implied reservation takes effect as a re-grant (*London v. Riggs*, 1880, 13 Ch. D. 798; 49 L. J. Ch. 297; *Midland R. Co. v. Miles*, 1886, 33 Ch. D.

644; 55 L. J. Ch. 745).

(a) 1887, 37 Ch. D. 490; 57 L. J. Ch. 255.

(b) 1900, 81 L. T. 673.

CHAPTER III.

ACQUISITION OF EASEMENTS BY PRESCRIPTION.

PRESCRIPTION may be defined to be, A title acquired by possession had during the time and in the manner fixed by law. "*Prescriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis*" (a). After the lapse of the requisite period the law adds the rights of property to that which before was possession only (b).

Acquisition of easements by prescription.
Definition of prescription

"Things corporeal can alone be susceptible of possession (c). Things incorporeal, that is to say, those 'quæ in jure consistunt,' are not in fact susceptible of possession, strictly and properly so called; but they are susceptible of a quasi-possession, 'jura non possidentur sed quasi possidentur.' This quasi-possession consists in the enjoyment of the right by him to whom it belongs. Thus, I am considered to have the quasi-possession of a right of servitude when I do, on the neighbouring heritage, in the sight and with the knowledge of the proprietor of that heritage, those acts which my right of servitude entitles me to do. This quasi-possession is susceptible of the same qualities and defects as possession properly so called" (d). To constitute a legal possession there must be not only a corporeal detention, or that quasi-detention which, according to the nature of the right, is equivalent to it, but there must be also the intention to act as owner (e). Thus, no legal possession is acquired by a man walking across the land of his friend (f), or using a private way, thinking it to be a public one (g); or unless he would do the act in defiance of opposition (h).

Possession

Legal possession.

(a) Co. Litt. 113 b.

(b) *Usucapio est adjectio domini per continuationem possessionis temporis lege definiti.*—Dig. 41, 3, 3, de usurp. "The Roman law relative to prescription has been adopted into the law of Normandy, which prevails in Jersey. We profess to act on the same principles": per Lord Wynford in the Privy Council, 1 Knapp. 69. See an examination of the principles of prescription by Lord Blackburn in *Dalton v. Angus*, 1881, 6 App. Cas. 817; 50 L. J. Q. B. 689.

(c) *Possideri autem possunt quæ sunt corporalia.*—Dig. 41, 2, 3, de acq. poss.

(d) Pothier, tom. 4, p. 580.—*Traité*

de la Loi Civile Française.

(e) *Apiscimur possessionem corpore et animo, neque p r se animo aut per se corpore.*—Dig. 41, 2, 3, § 1, de acq. vel amit. poss.

(f) *Qui jure familiaritatis amici fundum ingreditur non videtur possidere, quia non eo animo ingressus est ut possideat licet corpore in fundo sit.*—Dig. 41, 2, 41.

(g) *Servitute usus non videtur, nisi is qui suo jure uti se credidit; ideoque si quis pro viâ publicâ vel pro alterius servitute usus sit, nec interdictum nec actio utiliter competit.*—Dig. 8, 6, 25, quem. serv. amit.

(h) *Si per fundum tuum nec vi nec*

Acquisition of easements by prescription.

Possession must be uninterrupted.

From the very definition of Prescription, an enjoyment, in order to confer a title, must have been uninterrupted both as to the manner and during the time required by law. It is not to be understood by this expression that the enjoyment of an easement must necessarily be unintermittent; although, in a great variety of cases, it would obviously be so; as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way (*i*), it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him—an indication that would not be afforded by a mere accidental or occasional exercise (*k*).

The continuity of enjoyment may be broken either by the cessation to use, or by the enjoyment not being had in the proper manner.

“An enjoyment of an easement for one week,” said Parke, B., in the *Monmouthshire v. Harford* (*l*), “and a cessation to enjoy it during the next week, and so on alternately, would confer no right” (*m*).

clam nec precario commeevit aliquis, non tamen tanquam id suo jure faceret, sed, si prohiberetur, non facturus, inutile est ei interdictum de itinere actuque; nam ut hoc interdictum competat jus fundi possedisse oportet.—Dig. 43, 19, 7, de itinere actuque privato. See *Dyce v. Hay*, 1 Macqueen, 301.

(*i*) Nemo enim tam perpetuo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.—Dig. 8, 1, 14, de serv.

(*k*) Per Curiam in *Bartlett v. Downes*, 1825, 3 B. & C. 621; 3 L. J. K. B. 90; 27 R. R. 436; and in *Hollins v. Verney*, 1884, 13 Q. B. D. 304, 315; 53 L. J. Q. B. 430; and as to light, see *Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437; *Andrews v. Waite*, 1907, 2 Ch. 500; 76 L. J. Ch. 676.

(*l*) 1834, 1 C. M. & R. 631; 4 L. J. (N. S.) Ex. 43; 40 R. R. 648.

(*m*) This does not mean a cessation in the actual user, as, for instance, by reason of the claimant having no occasion to use the easement; or otherwise a right to a way or other non-continuous easement could not be acquired. It means a cessation in the user as of right, as in the case cited in the text, where the asking of permission during the period, by admitting that the person asking had no right at that time, interrupted the continuity of the enjoy-

ment as of right. See the question discussed in *Hollins v. Verney*, ubi sup.

In a claim by prescription at the common law, unity of possession without unity of ownership may not prevent its establishment. “If a man have common by prescription, unity of possession of *as high and perdurable an estate* is an interruption of the right” (Co. Litt. 114 b); and it is in the last-mentioned sense that “unity of possession” is used by Lord Mansfield in *Morris v. Edgington*, 1810, 3 Taunt., p. 30; 12 R. R. 579, where he speaks of a right of way or common extinguished by “unity of possession,” i.e., unity of ownership. The dictum of Martin, B., in *Winship v. Hudspeth*, 1854, 10 Exch. 8; 23 L. J. Ex. 268; that a claim by immemorial prescription at the common law would be defeated by proof of unity of possession at any time, must not be taken as applying to mere unity of possession without unity of ownership, which did exist in the case itself.

With regard to a claim under the Prescription Act, 1832, it has been held that mere unity of actual possession, occurring at any time during the period, is sufficient to prevent a claim from being established under the Act, even though the alleged dominant and servient tenements be held under different landlords (*Onley v. Gardiner*, 1838, 4 M. & W. 496; 8 L. J. (N. S.)

So, where the enjoyment has been had under permission asked from time to time, which, upon each occasion, amounts to an admission that the asker had then no right. Indeed, the very mode in which this enjoyment, under constantly renewed permission, operates in defeating the previous user is that it breaks the continuity of the enjoyment (*n*); and it is expressly laid down by the Court of King's Bench, in their judgment in the case of *Tickle v. Brown* (*o*), that the breaking of the continuity is inconsistent with the enjoyment during the periods of either twenty or forty years, and that for that reason evidence of the breaking of such continuity is admissible on a traverse of the enjoyment.

Acquisition of easement by prescription. Possession must be uninterrupted.

The interruption here spoken of is that arising from the act of the party claiming the right. The interruption of a right claimed under the statute by any act of the servient owner will be considered hereafter (*p*).

The mode of acquiring a title to an easement by prescription may be considered with respect—

First.—To the length of time during which the enjoyment must continue.

Second.—To the persons against and by whom the enjoyment must be had.

Third.—To the qualities of that enjoyment.

SECT. 1.—*The Length of Time during which the Enjoyment must be had.*

By the common law an enjoyment to confer a title to an easement must have continued during a period co-extensive with the memory of man; or, in legal phrase, “during time whereof the memory of man runneth not to the contrary.” To this expression a definite meaning was originally attached, as comprising the period elapsed

Length of time of necessary enjoyment.

(1) Prescription at common law.

Ex. 102; 51 R. R. 704; *Battishill v. Reed*, 1856, 18 C. B. 696; *Damper v. Bassett*, 1901, 2 Ch. 350; 25 L. J. C. P. 291; 107 R. R. 465). Lord Hatherley's dictum in *Ladyman v. Grace*, 1871, 6 Ch. at p. 768, and the reasoning of the Lords Justices in *Ecclesiastical Commissioners v. Kino*, 1880, 14 Ch. D. 213; 49 L. J. Ch. 529, and *Hollins v. Verney* (ubi sup.), appear to throw doubt upon the decisions in *Onley v. Gardiner* (ubi sup.) and *Battishill v. Reed* (ubi sup.). But in *Damper v. Bassett* (ubi sup.) Joyce, J., expressly stated that those two decisions had not been overruled or expressly disapproved of, and

followed them.

As to unity of seisin without unity of possession, cf. *Richardson v. Graham*, 1908, 1 K. B. 39; 77 L. J. K. B. 27.

(*n*) 1 C. M. & R. at p. 631, per Lord Lyndhurst.

(*o*) 1836, 4 A. & E. at p. 383; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358; *Beasley v. Clarke*, 1836, 2 Bing. N. C. 705; 5 L. J. (N. S.) C. P. 281; 42 R. R. 704; *Gardner v. Hodgson's Co., Ltd.*, 1903, A. C. 229; 73 L. J. Ch. 558.

(*p*) Post—Qualities of Enjoyment; and see the note on sect. 4 of the Prescription Act, post.

Length of
time of
necessary
enjoyment.

(1) Prescrip-
tion at
common
law.

since the year 1189. "Now, 'time of memory,' " says Blackstone, "has long ago been used and ascertained by the law to commence from the reign of Richard the First" (*q*)—a period adopted by an equitable extension of the statute 3 Edw. 1, c. 29, which fixed that as the date for alleging seisin in a real action.

The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period (*r*); where, however, the actual origin of the enjoyment was shown to have been of more recent date than the time of prescription, the right in earlier cases was held to be defeated. Thus, in *Bury v. Pope* (*s*), "It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years; yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land—and it was adjudged accordingly." This doctrine appears to have been held down to the passing of the Statute of Limitations, 21 Jac. 1, c. 16.

"When, by the Statute of Limitations, 3 Edw. 1, c. 39, the seisin in a writ of right was limited to the time of Richard I., so that none could count of an older seisin, this writ being the highest writ; it was taken to be also within the equity of the statute, that though a man might prove the contrary of a thing of which prescription was made, still this should not destroy the prescription, if the proof were of a thing beyond the time of limitation. For it was reasonable that the inquiry in a prescription should be limited as well as in a writ of right, being lower than that, for it was very hard to put juries to inquire of things so old" (*t*).

When the shorter time of sixty years was fixed for a writ of right, and fifty years for a possessory action by 38 Hen. 8, it has been said that a similar extension of the statute was not made by the courts of law, and that the time of prescription for incorporeal rights

(*q*) See the recital in 2 & 3 Will. 4, c. 71, s. 1.

(*r*) *Jenkins v. Harvey*, 1835, 1 Cr. M. & R. 894; 5 L. J. (N. S.) Ex. 17; 40 R. R. 769. "Theoretically, an ancient house at this period was a house which had existed from the time of Richard I. Practically, it was a house which had

been erected before the time of living memory, and the origin of which could not be proved": per Lush, J., in *Angus v. Dalton*, 1877, 3 Q. B. D. 89; 47 L. J. Q. B. 162.

(*s*) 1586, Cro. Eliz. 118.

(*t*) 2 Roll. Abr., tit. Prescription, 269, pl. 14.

remained as before (*u*). It is difficult to see upon what ground this distinction could have been made, as the enacting words of the two statutes are almost identical in expression, and the latter has been considered only as an addition to the former, restricting the period of prescription to sixty years before the action brought, and making no other alteration. And, following out this doctrine, the Courts, upon the fixing of a shorter period of limitation in possessory actions, ought to have diminished the length of enjoyment, from which a prescriptive right might be inferred, in all like actions to the period of twenty years, fixed by statute 21 Jac. 1.

Length of time of necessary enjoyment.
(1) Prescription at common law.

The opinion of Mr. Serjeant Williams, supported by high authority, seems to have been : “ That *an action on the case*, being a possessory action, was considered by the Courts to be in the nature of an ejectment ; and as no one can recover in ejectment, unless he or those under whom he claims have been in possession within twenty years, or rather as an adverse uninterrupted possession by another for twenty years is a bar to an ejectment, so an uninterrupted possession of an easement for the same time is considered as a bar to an action on the case, which has for its object, in common with an ejectment, the object of the possession, or at least the dispossessing the defendant of it.”—“From *Holcroft v. Heel* (*x*) it seems necessarily to follow that where a person has used and enjoyed an easement for twenty years and upwards, though it was a wrongful use at first, he thereby gains such a right that if he be disturbed in the enjoyment of it, he may maintain an action on the case for a disturbance ; and it is no answer to show that the plaintiff originally obtained the use and possession of it by usurpation and wrong ” (*y*).

There appears, therefore, some reason to doubt the correctness of the generally received opinion, that the equitable analogy above mentioned was not extended to the more recent statutes, 32 Hen. 8 and 21 Jac. 1, as well as to the earlier statute of Edward I. The only direct authority against this extension appears to be the opinion of Sir R. Brooke, as given in his reading on the statute of 32 Hen. 8, which is not stated to be founded on any decided case, while it is expressly laid down in Brooke’s Abridgment that 32 Hen. 8 “ entirely repealed the ancient Statute of Limitations, and that it extended equally with the former statutes to copyholds as well as to freeholds ; for the new statute is, that a man shall not make prescription, title, or claim, &c. ; and those who claim by copy

(*u*) 1st Report of Real Property Commissioners, p. 51.

35 R. R. 683 ; and see 7 R. R. 462.

(*x*) 1799, 1 Bos. & Pull. 400 ; *stated*

(*y*) 2 Wms. Saund. 175, n. ; 2 Notes to Saund. 503.

Length of
time of
necessary
enjoyment.

(1) Prescrip-
tion at
common
law.

make prescription, title, and claim, &c. ; also the complaints are in nature and form of a writ of our lord the king at common law, &c. ; and those writs which have been brought at common law are ruled by the new limitation, and therefore the complaints of copyhold shall be of the same nature and form " (z).

In *Bury v. Pope*, above cited, which was decided during the period which intervened between the passing of the two statutes of Hen. 8 and Jac. 1, sufficient time had not elapsed to confer a title by the former statute, even supposing the equitable analogy to have existed. *Whitton v. Crompton* (a), which appears to be the only case decided expressly upon the statute of 32 Hen. 8, and which is at the most but a doubtful authority, turned upon the point that a formedon, having been given since the passing of the Statute of Westminster, was not within the 32 Hen. 8, which was but a mere continuation of it ; and ultimately the case appears to have been compromised.

The opinion of Mr. Serjeant Williams is in accordance with the expression of Lord Mansfield, " That an incorporeal right, which, if existing, must be in constant use, ought to be decided by analogy to the Statute of Limitations " (b). " The several Statutes of Limitations," said Abbott, C.J., " being all in *pari materiâ* ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same " (c). The view of Serjeant Williams, above cited, is however at variance with the generally received opinions upon this subject (d).

Length of
time of
necessary
enjoyment
(2) Lost
grant.

But, although the Courts refused in form to shorten the time of legal memory by analogy to the later Statutes of Limitation, they obviated the inconvenience which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required, by introducing a new kind of title by presumption of a grant made and lost in modern times (e). On this ground, although it appeared that a right

(z) Tit. Limitations, pl. 2.

(a) 1568, 3 Dyer, 278 a.

(b) 2 Evans' Pothier, 136.

(c) *Murray v. E. I. Co.*, 1821, 5 B. & Ald. 215 ; 24 R. R. 325 ; see also *Tolson v. Kaye*, 1822, 6 Moore, C. P. 558 ; 23 R. R. 615, per Dallas, C.J. ; and the opinion of Lush, J., in *Angus v. Dalton*, 1877, 3 Q. B. D. at p. 94 ; 47 L. J. Q. B. 163 ; and compare the suggestions of Pollock, B., and Field and Manisty, JJ., in *Dalton v. Angus*,

1881, 6 App. Cas. 746, 753, 768 ; 50 L. J. Q. B. 689.

(d) See, e.g., *Angus v. Dalton*, 1878, 4 Q. B. D. 170, 199 ; 48 L. J. Q. B. 225 ; per Thesiger and Brett, L.JJ., and 1881, 6 App. Cas. 778 ; 50 L. J. Q. B. 689 ; per Fry, J.

(e) The introduction of this doctrine was attempted by a modern civilian. *Laudensis*, says Merlin, p. 82, alleges that though a prescription is not admissible in support of a discontinuous ser-

of way which existed formerly had been extinguished by unity of possession (*f*), or even by an Act of Parliament (*g*), it has been held

Length of time of necessary enjoyment.
(2) Lost grant.

vitute, usage will raise an inference of an actual grant, the existence of which is to be deduced from the patience of the adversary. "C'est bien là," says Merlin, "apprendre aux plaideurs et aux praticiens des chicanes dont ils ne sont que trop enclins à profiter."

The earliest reported decision to this effect is that of *Lewis v. Price* in 1761; per Lord Blackburn in *Dalton v. Angus*, 1881, 6 App. Cas. 812; 50 L. J. Q. B. 689.

(*f*) *Keymer v. Summers*, cited in *Read v. Brookman*, 1789, 3 T. R. 157; Bull. N. P. 74.

(*g*) *Campbell v. Wilson*, 1803, 3 East, 294; 7 R. R. 462; see also *Hull v. Horner*, 1774, 1 Cowp. 102; *Eldridge v. Knott*, 1774, ib. 214; *Holerst v. Heel*, 1799, 1 Bos. & P. 400; 35 R. R. 683; and see 7 R. R. 462; *Dartmouth v. Roberts*, 1812, 16 East, 334; *Livett v. Wilson*, 1825, 3 Bing. 115; 3 L. J. (O. S.) C. P. 186; *Doe d. Fenwick v. Reed*, 1821, 5 B. & Ald. 232; 24 R. R. 338; *Codling v. Johnson*, 1829, 9 B. & C. 933; 33 R. R. 375; 8 L. J. K. B. 68.

The case of *Campbell v. Wilson*, above referred to, in which it was held that the enjoyment of a way for twenty years was sufficient evidence from which to presume a grant or other lawful origin of a right of way (though an Act of Parliament had, prior to that enjoyment, extinguished a like right over the same land, so that the twenty years' enjoyment was in fact had by reason of the neglect of the owner of the servient tenement to avail himself of the provisions of the Act), is not at variance with the rule that a man cannot prescribe against a statute (Co. Litt. 115a), a rule which holds good in the case of easements. The object of the Inclosure Act in the case referred to was simply to benefit the owners of allotted lands, by exempting them from the burden of existing rights of way, but not to injure the allottees by restricting the power of each allottee to dispose of or burden his own land as he might think proper; and there was nothing in the statute prohibiting the creation of new rights. But where the acts of user relied upon are contrary to some statutory provision, so that an actual grant of the right which is sought to be established by user would be void, and it cannot possibly be referred to any legal origin, the common law rule prevails, and no right is acquired (*Rochdale v. Radcliffe*, 1852,

18 Q. B. 287; 2 Sim. N. S. 78; 21 L. J. Q. B. 297; 88 R. R. 587; *Race v. Ward*, 1857, 7 E. & B. 384; 26 L. J. Q. B. 133; 110 R. R. 637; *National Manure Co. v. Donald*, 1859, 4 H. & N. 8; 28 L. J. Ex. 185; 118 R. R. 299; *Staffordshire Navigation v. Birmingham Navigation*, 1866, L. R. 1 H. L. 267, 278; 35 L. J. Ch. 257; *Newerson v. Peterborough*, 1902, 1 Ch. 557; 31 L. J. Ch. 378). Cf. *Traill v. McAllister*, 1891, 25 L. R. Ir. 524. In *Mill v. New Forest*, 1856, 18 C. B. 60; 25 L. J. C. P. 212; 107 R. R. 205, a right of common over the lands of the Crown in the New Forest was claimed in respect of a piece of land which had formerly been part of the waste of the claimant's manor, but which had been inclosed in the year 1810, and afterwards occupied as a farm. The Court held that the user of turning cattle from this farm on to the Crown lands from the time of the inclosure down to the time of the claim conferred no right, by reason that a statute, 9 & 10 Will. 3, c. 36, s. 10, prohibits the creation of any such right in the New Forest. It may occur to the reader that the claimant's predecessors may possibly have had, before the passing of the statute last referred to, a right, in respect of the waste lands of the manor, of turning cattle on to the common lands of the Crown (in accordance with what was said by Bayley, J., in *Sefton v. Court* (1826), 5 B. & C. 917; 4 L. J. (O. S.) K. B. 319; that a lord of a manor may have a right of turning out cattle on a common, in respect not only of his cultivated lands but also of his waste lands), and that the user subsequent to the inclosure was evidence of the existence of such a right in the claimant's predecessors, and that the user was not, therefore, necessarily illegal under the statute. This point, however, did not arise, as the claimant did not satisfy the commissioners who found the facts of the case that any right did exist before 1810, so that the possibility of a legal origin for the right claimed was excluded.

The judgments in *Codling v. Johnson* and *Sefton v. Court* are both authorities that the mere fact of the tenement in respect of which a claim by prescription at common law is set up, being shown not to have formerly existed in the same state, is not conclusive against the claim.

Length of
time of
necessary
enjoyment.
(2) Lost
grant.

that a new title might be obtained by an enjoyment for twenty years. And in a later case, where windows were shown to have existed twenty years, proof that they did not exist twenty-two years before the obstruction was insufficient to defeat an action (*h*).

This was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1, and introduced into the law under a new name; for "the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed" (*i*).

The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained. "When the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, *omnia presumuntur rite esse acta*, and the Court will, if reasonably possible, find a lawful origin for the right in question" (*k*).

The introduction of this doctrine was attended with considerable opposition; and it was contended that to sustain a claim founded upon such a lost grant, the jury must actually believe in its existence, or, at all events, they must find it as a fact, though they did not believe it (*l*).

The practical distinction between prescription at common law and the doctrine of lost grant was that, where the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by "lost grant," the long enjoyment afforded but a presumption of title. But although the evidence of this enjoyment was in theory presumptive evidence only, yet it was in practice and effect conclusive (*m*). And if a jury had disregarded the recommendation of a judge "that such evidence warranted the presumption of a grant," the Court would have directed a new trial toties quoties (*n*).

(*h*) *Penwarden v. Ching*, 1829, Moo. & Mal. 400. In *Philipps v. Halliday*, 1891, A. C. 228; 61 L. J. Q. B. 210, a faculty for a pew was presumed after long possession.

(*i*) 2 Bl. Com. 265, citing *Potter v. North*, 1680, 1 Vent. 387; see *Gardner v. Hodgson's Co.*, 1903, A. C. 239; 72 L. J. Ch. 558. The expedient "is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from time immemorial, and is therefore only applicable when the right claimed is such as, if immemorial, might have been

the subject of prescription": per Lord Blackburn, in *Dalton v. Angus*, 1881, 6 App. Cas. 816; 50 L. J. Q. B. 689.

(*k*) *A.G. v. Simpson*, 1901, 2 Ch. 671; per Farwell, J., 698; 70 L. J. Ch. 828; see *Tyne v. Imrie*, 1899, 81 L. T. 174. Cf. *A.G. v. Antrobus*, 1905, 2 Ch. 188; 74 L. J. Ch. 599.

(*l*) 2 Evans' Pothier, 136.

(*m*) See per Parke, B., in *Bright v. Walker*, 1834, 1 C. M. & R. at p. 217; 3 L. J. (N. S.) Ex. 250; 40 R. R. 536, preface, vi.

(*n*) See per Alderson, B., in *Jenkins v. Harvey*, 1835, 1 C. M. & R. 895; 5 L. J. (N. S.) Ex. 17; 40 R. R. 769.

Doubts and difficulties, however, still arose from the vague and uncertain language frequently made use of by judges in leaving these questions to the jury—enjoyment being sometimes treated as affording a conclusive presumption, whilst at others such user was only considered to be “ cogent evidence ” of prescription (*o*), the presumption of which judges were in the habit of recommending juries to adopt.

Length of
time of
necessary
enjoyment.
(2) Lost
grant.

In *Dalton v. Angus* (*p*), where the subject was fully considered, all the judges appear to have been of opinion that the presumption was capable of being rebutted by some means or other (*q*) ; but they differed upon the question, what evidence or admission was sufficient for the purpose.

Dalton v.
Angus.

The plaintiffs had proved enjoyment of the support claimed for their factory since its erection twenty-seven years before the accident which gave rise to the action, and claimed the right under the doctrine of lost grant ; but it was either proved or admitted at the trial that no grant had ever in fact been made. Notwithstanding this admission, Lush, J., at the trial directed a verdict for the plaintiffs ; and, on the motion for judgment, he adhered to his opinion, “ that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption ; in other words, that it would be presumed, after the lapse of twenty years, that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance ” (*r*). Cockburn, C.J., on the contrary, held that, when it was proved or

In the Q. B.

(*o*) *Rex v. Jolliffe*, 1823, 2 B. & C. 54 ; 1 L. J. K. B. 232 ; 26 R. R. 264. See Best on Presumptions, p. 103 ; and per Bowen, J., in *Dalton v. Angus*, 1881, 6 App. Cas. at p. 781 ; 50 L. J. Q. B. 689 : “ The twenty years’ rule . . . in truth was nothing but a canon of evidence.”

(*p*) 1877 to 1881, 3 Q. B. D. 85 ; 47 L. J. Q. B. 163 ; 4 Q. B. D. 162 ; 48 L. J. Q. B. 225 ; 6 App. Cas. 740 ; 50 L. J. Q. B. 689. This case is now a leading authority upon several branches of the law of easements, and notably upon the following points, each of which is dealt with in its place : (1) the presumption of lost grant and the evidence admissible to rebut it ; (2) the position

of negative easements under Lord Tenterden’s Act ; (3) secrecy of enjoyment ; (4) the effect of an enjoyment which it is impossible or difficult to interrupt ; (5) the characteristics of the easement of support generally ; and (6) the liability of an employer for the acts of his contractor. The several aspects of the case are considered in the several passages of this treatise where these subjects respectively come up for treatment.

(*q*) See especially the cases collected by Cockburn, C.J., 3 Q. B. D. 106 ; and the observations of Brett, L.J., 4 Q. B. D. 200.

(*r*) 3 Q. B. D. 93.

Length of
time of
necessary
enjoyment.

(2) Lost
grant.

Dalton v.
Augus.

In the C. A.

admitted that the assent of the defendant's predecessor was not asked for or obtained, by grant or in any other way, to any support being derived from the soil, the presumption was at an end (*s*). He was also of opinion that, the enjoyment of the support claimed not being capable of being interrupted, no grant could be implied from the failure to interrupt it. Mellor, J., agreed on both points with Cockburn, C.J., and judgment was given for the defendants.

The Court of Appeal was also divided upon the question now under consideration. Brett, L.J., considered that the question of grant or no grant was a pure question of fact to be found by the jury, and that to exclude evidence tending to show that there never was a grant would be to usurp the functions of the Legislature (*t*); quoting the observation of Lord Mansfield in *Hull v. Horner* (*u*), that "length of time, used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances." Thesiger, L.J., while holding that the presumption of lost grant might be negatived by showing "a legal incompetence as regards the owner of the servient tenement to grant an easement (*x*), or a physical incapacity of being obstructed as regards the easement itself (*y*), or an uncertainty and secrecy of enjoyment putting it out of the category of all known easements" (*z*), was of opinion that the presumption could not be rebutted by mere proof that no grant had in fact been made. "The presumption of acquiescence," he said, "and the fiction of an agreement or grant deduced therefrom, in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct" (*a*). Cotton, L.J., agreed with Thesiger, L.J. (*b*). In the result, the Court directed that the defendants should elect within fourteen days whether they would take a new trial, which the Court thought them entitled to upon the point of notice, and that, if they did not so elect, judgment should be entered for the plaintiff.

(*s*) 3 Q. B. D. 117, 120.

(*t*) 4 Q. B. D. at p. 201. Compare the expressions of opinion by the same judge in *Norfolk v. Arbutnot*, 1880, 5 C. P. D. 393; 49 L. J. C. P. 782; and in *De la Warr v. Miles*, 1881, 17 Ch. D. 590; 50 L. J. Ch. 754.

(*u*) 1771, Cowp. 102.

(*x*) See *Barker v. Richardson*, 1821, 4 B. & Ald. 579; 23 R. R. 400; and

above, p. 187, note (*g*).

(*y*) See *Webb v. Bird*, 1863, 13 C. B. N. S. 841; 31 L. J. C. P. 335; 134 R. R. 756.

(*z*) See *Chasemore v. Richards*, 1859, 7 H. L. C. 349; 28 L. J. Ex. 81; 115 R. R. 187.

(*a*) 4 Q. B. D. p. 173.

(*b*) *Ib.*, p. 186.

The defendants did not elect to take a new trial, but appealed to the House of Lords (*c*), where the case was twice argued by counsel for the appellants and for the respondents, and questions were put to seven judges of the High Court. Of the judges, three (*d*) based their opinions upon grounds which rendered it unnecessary for them to consider in what manner the presumption of lost grant might be rebutted; three (*e*) in effect agreed with Thesiger and Cotton, L.J.J., that the presumption could not be rebutted merely by showing that no grant had in fact been made; while the seventh (*f*) was of opinion that proof by the defendants that the right claimed had not been granted either by deed or by equitable agreement was sufficient to rebut the presumption.

Length of
time of
necessary
enjoyment.

(2) Lost
grant.

Dalton v.

Angus.

In Dom.

Proc.

Opinions of
the judges.

The opposite points of view of the four last-named judges on this question are fully expressed in the opinions of Lindley and Bowen, J.J., respectively. "The theory of implied grant," said Lindley, J., "was invented as a means to an end. It afforded a technical common law reason for not disturbing a long-continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favour of its legality ought to be made" (*g*). Bowen, J., on the other hand, treated the rule as to presuming a grant or agreement from twenty years' enjoyment as nothing more than a canon of evidence, similar to the presumption of death arising from seven years' absence without news received, or to the presumption of the satisfaction of a bond after twenty years, and similarly liable to be displaced by counter-evidence. "It seems a contradiction in terms to maintain that the rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant had ever been made. . . . But . . . it would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well" (*h*). Lindley and Lopes, J.J., agreed with Bowen, J., that the question of notice should have been submitted to the jury; but, the defendants having rejected a new trial, this was now immaterial to the particular case.

The House (*i*), after hearing the judges, unanimously affirmed the

Speeches of
Law Peers.

(c) 6 App. Cas. 740.

(d) Pollock, B., and Field and Manisty, J.J.

(e) Lindley, Lopes, and Fry, J.J., the last-named bowing to authority, but questioning the principle of the decided

cases.

(f) Bowen, J.

(g) At p. 765.

(h) See pp. 779 to 783 of the report.

(i) Lord Selborne, L.C., and Lords Penzance, Blackburn, and Watson.

Length of
time of
necessary
enjoyment.

(2) Lost
grant.

Dutton v.
Angus.

decision of the Court of Appeal, Lord Penzance alone questioning the principle, but following the previous decisions. Lord Blackburn appears to have proceeded on the grounds which influenced Pollock, B., and Field and Manisty, JJ., looking upon the right claimed as springing directly from the long enjoyment, without the interposition of a grant inferred or imputed; and he did not therefore consider the question here discussed. Lord Selborne, while expressing an opinion that the right claimed was conferred by the Prescription Act (*k*), thought that the same result could be reached by the doctrine of presumed grant, and expressed his concurrence with the majority of the Court of Appeal (*l*). Lord Watson in effect agreed with Lord Selborne.

The effect of the decision is effectually to establish the rule that an easement of support for new buildings may be acquired by twenty years' open and uninterrupted user; and although the Lords do not expressly discuss the general question as to what evidence is admissible to rebut the presumption of lost grant, the effect of their judgment is to affirm the opinion of Thesiger and Cotton, L.JJ. It follows that the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given (*m*), and the Court will make any possible presumption necessary to give that long enjoyment a legal origin (*n*). But it appears to be still law that an incapacity to grant the easement will rebut the presumption in question and negative the claim so far as it rests on the fiction of a lost grant (*o*). And it is clear that the claim may be resisted on any ground which would prevent the right from being acquired by prescription from time immemorial (*p*).

Objections to
the doctrine
of lost grant.

This mode of carrying out the policy of the law, by the intervention of a jury, has been strongly objected to. A distinguished writer has observed:—

(*k*) See below, p. 197, note (*p*).

(*l*) 6 App. Cas. at p. 800.

(*m*) Cf. *Goodman v. Saltash*, 1882, 7 App. Cas. 633; 52 L. J. Q. B. 193; *Bass v. Gregory*, 1890, 25 Q. B. D. 481; 59 L. J. Q. B. 574; *Philipp v. Halliday*, 1891, A. C. 228; 61 L. J. Q. B. 210. Dist. *Tilbury v. Silra*, 1890, 45 Ch. D. 98.

(*n*) *A.-G. v. Simpson*, 1901, 2 Ch. 698; 70 L. J. Ch. 828; *East Stonehouse v. Willoughby*, 1902, 2 K. B. 332; 71 L. J. K. B. 873; *Dawson v. M'Grogan*,

1903, 1 I. R. 98.

(*o*) See the opinion of Thesiger, L.J., above, at p. 190, and the cases there quoted: *Tyne v. Imrie*, 1899, 81 L. T. 124; *Neaverson v. Peterborough*, 1902, 1 Ch. 557; 31 L. J. Ch. 378; and cf. *Wheaton v. Maple*, 1893, 3 Ch. 48; 62 L. J. Ch. 963. As to the effect of incapacity to grant an easement, see post, p. 211.

(*p*) See, e.g., *Roberts v. James*, 1903, 89 L. T. 282; cf. *A.-G. v. Antrobus*, 1905, 2 Ch. 188; 74 L. J. Ch. 599.

"The practice of requiring juries in any case to be mere passive instruments in finding facts upon their oaths, in the existence of which the Court itself did not believe, although now established, is of singular origin. The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say why such presumptions should not at once have been established as mere presumptions of law to be applied to the facts by the Courts, without the aid of a jury. That course would certainly have been more simple; and any objection as to the want of authority would apply with equal, if not superior, force to the establishing such presumptions indirectly through the medium of a jury" (q).

The stat. 2 & 3 Will. 4, c. 71 (commonly called the Prescription Act), "was intended," said Parke, B. (referring to the relief of the consciences of jurymen), "to accomplish this object by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury" (r). This Act, however, contains enactments much more extensive than would be necessary for the attainment of this object merely; and it certainly is to be lamented that its provisions were not more carefully framed. From the preamble it would seem that the principal motive for passing the Act was simply to obviate the difficulty of showing the actual commencement of enjoyment within legal memory.

It is of the utmost importance to ascertain what the law really was upon the subject of titles by prescription at the time of passing the statute: as the statute, although it has given some increased facilities to a party claiming an easement, has not superseded the common law, but allowed him an election to proceed either under the statute or according to the common law, or under the doctrine of lost grant, or by all these methods (s).

(g) 2 Stark. on Evid., 2nd ed. 675, 669; and see *Dawson v. M'Groggan*, 1903, 1 I. R. 98.

(r) *Bright v. Walker*, 1834, 1 C. M. & R. 218; 3 L. J. (N. S.) Ex. 250; 40 R. R. 536; preface, vi.; and per Cockburn, C.J., in *Angus v. Dalton*, 1877, 3 Q. B. D. 105; 47 L. J. Q. B. 163; and Lord Macnaghten in *Gardner v. Hodgson's Co.*, 1903, A. C. 236; 70 L. J. Ch. 504.

(s) "The statute only applies where you want to stand upon thirty years' user; but here, where the title is one of 200 or 300 years, that statute is not

needed, and the title can be rested on the original right before the passing of the statute" (*Warrick v. Queen's College*, 1871, 6 Ch. 728; 40 L. J. Ch. 780; *Agnosley v. Glover*, 1875, 10 Ch. 283; 44 L. J. (N. S.) Ch. 523; *Leconfield v. Lonsdale*, 1870, L. R. 5 C. P. 726; 39 L. J. C. P. 395; *Dalton v. Angus*, 1881, 6 App. Cas. 814; 50 L. J. Q. B. 689; *Gardner v. Hodgson's Co.*, 1903, A. C. 238; 70 L. J. Ch. 504; see, however, the opinion expressed by Farwell, L.J., in *Hyman v. Van den Bergh*, 1908, 1 Ch. 176; 77 L. J. Ch. 154).

Length of time of necessary enjoyment
(2) Lost grant.

(3) The Prescription Act, 1832.

The statute has not superseded the common law.

Length of time of necessary enjoyment.

(3) The Prescription Act, 1832.

As regards a lost grant in particular, it should be noted here that in recent years the Courts have had frequent recourse to this doctrine and have repeated and applied in various ways the words of Lord Herschell in *Philipps v. Halliday* :—"Where there has been long-continued possession in assertion of a right, it is a well settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title" (*t*).

The doctrine of lost grant has been resorted to as an alternative not only to prescription at common law, but also to prescription under the Act (*u*). The Courts have presumed lost grants in the nature of an agreement substituting one way for another (*x*); or of an agreement as to paying a quit rent (*y*). The Court will presume not only a grant from an individual, but an award (*z*); or a faculty from the ordinary (*a*); or a regulation of a port authority (*b*).

As regards the Crown, the Courts have presumed a grant of a lost charter (*c*). They have presumed a grant from the Crown to a corporation of the right to discharge sewage into a tidal river (*d*). They have also presumed the grant of a manor (*e*), or of a several fishery in tidal waters (*f*). Lost grants by the Crown have also been presumed of a franchise ferry, whether from point to point (*g*) or from vill to vill (*h*).

Prescription Act, 1832.
Preamble.

The statute (2 & 3 Will. 4, c. 71) (*i*) is as follows: "*An Act for shortening the Time of Prescription in certain Cases*.—Whereas the expression 'time immemorial, or time whereof the memory of man

(*t*) 1891, A. C. 231; 61 L. J. Q. B. 210. The words were repeated, by Lord Halsbury, *Clippens v. Edinburgh*, 1904, A. C. 69; 73 L. J. P. C. 32; by Joyce, J., *Hulbert v. Dale*, 1909, 2 Ch. 578; 78 L. J. Ch. 457; by Buckley, L.J., *A.-G. v. Horner*, 1913, 2 Ch. 177; 82 L. J. Ch. 239; and by Lord Reading, *General Estates v. Beaver*, 1914, 3 K. B. 926; 84 L. J. K. B. 21.

(*u*) *Simpson v. Godmanchester*, 1897, A. C. 696; 66 L. J. Ch. 770.

(*v*) *Hulbert v. Dale*, *ubi sup.*

(*y*) *Bomford v. Neville*, 1904, 1 I. R. 474; *Foley v. Dudley*, 1910, 1 K. B. 317; 79 L. J. K. B. 410.

(*z*) *East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 332; 71 L. J. K. B. 873.

(*a*) *Philipps v. Halliday*, *ubi sup.*

(*b*) *A.-G. v. Knight*, 1897, 2 Q. B. 318.

(*c*) *Goodtitle v. Baldwin*, 1809, 11

East, 490; 11 R. R. 249; *Rivers v. Adams*, 1878, 3 Ex. D. 365; 48 L. J. Ex. 49. As to a lost grant by the Crown of a market, see *A.-G. v. Horner*, 1885, 11 App. Cas. 66; 55 L. J. Q. B. 193; 1913, 2 Ch. 140; 82 L. J. Ch. 339.

(*d*) *Somersetshire v. Bridgwater*, 1904, 89 L. T. 732.

(*e*) *Merittens v. Hill*, 1901, 1 Ch. 851; 70 L. J. Ch. 489.

(*f*) *Goodman v. Saltash*, 1882, 7 App. Cas. 633; 52 L. J. Q. B. 193.

(*g*) *Dysart v. Hammerton*, 1914, 1 Ch. 822; 83 L. J. Ch. 530.

(*h*) *General Estates v. Beaver*, 1914, 3 K. B. 918; 84 L. J. K. B. 21.

(*i*) This statute was formerly often referred to as Lord Tenterden's Act. Now, under the Short Titles Act, 1892, it may be cited as the Prescription Act, 1832.

runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted,

"That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*k*), to any right of common or

Prescription Act.

(*k*) The right to receive light passing across a neighbour's land may be claimed as an easement, but the right to take something out of the soil is a profit à prendre and not an easement (*Manning v. Wadale*, 1836, 5 A. & E. 764; *Sutherland v. Heathcote*, 1892, 1 Ch. 484). The nature of profits à prendre (including the right to kill and carry away game and fish) is discussed in *Wickham v. Hawker*, 1840, 7 M. & W. 63; *Ewart v. Graham*, 1859, 7 H. L. C. 344; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 163; *R. v. Surrey*, 1910, 2 K. B. 417. The right granted in the above case of *Wickham v. Hawker* seems to have been a right in gross, and the decision in that case should now be read in connection with the decisions under s. 5 (post), to the effect that the method of claim under the Act does not apply to rights in gross.

The first section has no application to a right to profits à prendre (e.g., the right of digging clay) claimed by a copyholder in the soil of his own tenement according to the custom of the manor (*Hanner v. Chance*, 1865, 4 D. G. J. & S. 626; 34 L. J. Ch. 416). As regards claims to profits à prendre in the soil of another, it is settled that (apart from claims by copyholders to common in the waste under the custom of the manor) such profits cannot be claimed by custom (*Blewett v. Tregonning*, 1835, 3 A. & E. 534; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 163). They may, however, be claimed by prescription, either as rights in gross or as appurtenant to land. Considered as rights in gross, they may, it seems, be prescribed for without stint (*Chesterfield v. Harris*, 1908, 2 Ch. 421, 422; 77 L. J. Ch. 688). The method of claim under the Act does not in this case apply (see note to s. 5, post), but a claim may be made by common law prescription (*Johnson v. Barnes*, 1872, L. R. 7 C. P. 592; 8 C. P. 527). Considered as appurtenant to land, these

profits cannot be prescribed for without stint and for commercial purposes, but must be limited by the wants of the land to which they are appurtenant (*Chesterfield v. Harris*, 1908, 2 Ch. 412, 424; see *Baylis v. Tysen-Vanharst*, 1877, 6 Ch. D. 500; 46 L. J. Ch. 718; *A.-G. v. Reynolds*, 1911, 2 K. B. 920; 80 L. J. K. B. 1073). So held where a prescriptive right was claimed to a common of fishery (*Chesterfield v. Harris*, sup.). And again it was said that a claim by prescription to common of pasturage for all manner of commonable cattle would be void, not being limited to cattle levant and couchant (*Morley v. Clifford*, 1882, 7 Ch. D. 757). When the claim is made in a limited form, the method of claim under the Act applies (*De la Warr v. Miles*, 1880, 17 Ch. D. 585).

The enjoyment on which a claim under the Act to a profit à prendre is based must not be contentious (*Lyell v. Hothfield*, 1914, 3 K. B. 916) nor attributable to a mistaken claim (ib.; see *A.-G. v. Horner*, 1913, 2 Ch. 188; 82 L. J. Ch. 339; see contra *De la Warr v. Miles*, 1880, 17 Ch. D. 585; 50 L. J. Ch. 754). It must be an enjoyment "as of right" (*De la Warr v. Miles*, sup.).

The judgment in *Carlyon v. Lovering*, 1857, 1 H. & N. 784, shows that the extent of the right claimed by user is not material, if the whole right could have been legally granted; and see *Dawson v. McGroggan*, 1903, 1 I. R. 92. But where the whole right claimed cannot be established on the ground claimed, an incidental portion of this right cannot be established merely on usage (*A.-G. v. Horner*, 1913, 2 Ch. 169; 82 L. J. Ch. 339; *Hammerton v. Honey*, 24 W. R. 604; *De la Warr v. Miles*, 17 Ch. D. 598; 50 L. J. Ch. 754).

The Act only affects rights, not duties; see *Williams, J.*, in *Peter v. Daniel*, 1848, 5 C. B. at p. 573.

Claims to right of common and other profits à prendre not to be defeated after thirty years' enjoyment by showing only the commencement;

Prescription
Act.

after sixty
years' enjoy-
ment the
right to be
absolute,
unless had by
consent or
agreement in
writing.

other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate (except such matters and things as are herein specially provided for, and except tithes, rent, and services), shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto (*l*) without interruption (*m*) for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement (*n*) expressly made or given for that purpose by deed or writing" (*o*).

(*l*) I.e., claiming right thereto as an easement and as of right; see *Harbidge v. Warwick*, 1849, 3 Exch. 552; 77 R. R. 725; *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; *Chamber Colliery Co. v. Hopwood*, 1886, 32 Ch. D. 549; *Gardner v. Hodgson's Co.*, 1903, A. C. 229. As to enjoyment as of right, and generally as to the qualities and character of the necessary enjoyment, see post, p. 221.

(*m*) See the notes to s. 4, below.

(*n*) As to the "consent or agreement," see note to s. 3, post.

(*o*) The provisions of the first section as to profits à prendre differ only from those of the second as to easements in respect of the length of the periods of user required, and the principles of the decisions on one section are in almost every case applicable to the other.

These sections make no change in the common law, first, as to the nature or extent of the rights which can be claimed as profits à prendre, or as easements; or, secondly, as to the requisite qualities of the user by which they can be acquired, viz., that it must be "nec vi nec clam nec precario" (with a single exception noticed below); or, thirdly, as to the admissibility of facts showing that the enjoyment could not possibly have been as of right, as, e.g., where it is shown that the right, if any, must have originated at a certain time, when and since which the new acquisition of

such right was prohibited by law, either in respect of the lands over which or the persons by whom the right is claimed.

The exception above mentioned as to the qualities of the user which (where the claim is made under the Act) has been introduced by it is that of the case in which under the Act a right can be acquired by a precarious user. That is the case of an enjoyment for either of the longer periods under a parol consent extended over the whole period and not renewed during it. In this one and almost impossible instance a right may be acquired under the Act by an enjoyment which at common law would have been bad as precarious. See the judgment in *Tickle v. Brown*, 1836, 4 A. & E. 381; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358. This results from the provisions of ss. 1 and 2 to the effect that an enjoyment for the longer periods shall only be defeated by proof of a written consent or agreement, which involves the consequence that, where there is no written consent or agreement, an enjoyment, though permissive, may be as of right, unless the claimant by asking permission during the period admits that he has then no right, and so breaks the continuity of enjoyment. See the judgment of Cozens-Hardy, J., *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 595, 600; 70 L. J. Ch. 504.

Sect. 2. "And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement (*p*), or to any watercourse or the use of any water (*q*), to be enjoyed or derived upon, over, or from any land or

Prescription Act.

In claims of right of way or other easement the periods to be twenty years and forty years.

The practical result is, that in the case of the shorter periods any point whatever which might have been taken at the common law against a claim by prescription or grant, may be taken against a claim under s. 1 or 2 of the Act, except one, i.e., that the right originated within the time of legal memory. In the case of the longer periods the question what point may be taken against a claim under ss. 1 and 2 turns largely on the further question discussed below (post, p. 218) whether in this case a grant must be presumed.

Moreover, the decisions subsequently referred to show that, in order to make out a case under the statute, under either the first or second section, and both as to the longer and shorter periods, the claimant is exposed to certain difficulties which did not exist at common law.

They are as follows:—

1. The user must be proved for the period computed next before the commencement of the action in which the claim is contested (s. 4).

2. There must be nothing in the facts inconsistent with the continuous enjoyment of the profit à prendre or easement as such during the whole period; e.g., unity of actual possession at any time during the period would be fatal to any claim under the Act, however small the interest of the person exercising the alleged right may have been in the land upon which it was exercised. As to the effect of unity of possession where the claim is made by prescription at common law, see the note ante, p. 182.

3. The right acquired is measured by the user during the necessary period of enjoyment, and can be only co-extensive with it. For example, in a claim of common by immemorial prescription, at the common law, the fact that a house obstructing the exercise of the right on its site had stood on the common for two or three years before the action would not have prevented the proof of the right to the use of the entire common, including the site of the house. But under the Prescription Act the right acquired would only be co-extensive with the user during the above period, and the site of the house would be excluded. See *Davies v.*

Williams, 1851, 16 Q. B. 546; 20 L. J. Q. B. 330; 83 R. R. 592; and the dictum of Cresswell, J., in *Moore v. Webb*, 1857, 1 C. B. N. S. 676, as to the application of this to easements. And see per Lord Robertson in *Pirie v. Kintore*, 1906, A. C. 478, 484; 75 L. J. P. C. 96.

(*p*) This section does not apply to the easement of light, which is separately dealt with by s. 3 (*Perry v. Eames*, 1891, 1 Ch. 658; 60 L. J. Ch. 345; *Wheaton v. Maple*, 1893, 3 Ch. 48; 62 L. J. Ch. 693). But it is not confined (as suggested by Erle, C.J., in *Webb v. Bird*, 1861, 10 C. B. N. S. 268; 13 C. B. N. S. 341; 30 L. J. C. P. 384; 128 R. R. 707) to rights of way and water (*Dalton v. Angus*, 1881, 6 App. Cas. 793, per Lord Selborne; 50 L. J. Q. B. 737; *Bass v. Gregory*, 1890, 25 Q. B. D. 481; 59 L. J. Q. B. 574; *Simpson v. Godmanchester*, 1897, A. C. 696, 699; 66 L. J. Ch. 770). In *Dalton v. Angus* it appears to have been the general view that the section applied only to affirmative easements; but the question was raised whether the right of support to buildings was affirmative or negative. See *Lemaître v. Davis*, 1881, 19 Ch. D. 681; 51 L. J. Ch. 173. It has been held that the section applies to a right to open locks (*Simpson v. Godmanchester*, sup.) and to the passage of air through a defined channel (*Harris v. De Pinna*, 1886, 33 Ch. D. 250; 56 L. J. Ch. 344), but not of undefined air (ib. 262).

It was said by Lord Penzance that a prescriptive right of a pew cannot be claimed under the Act (*Crisp v. Martin*, 1876, 2 P. D. 28). But it may be claimed by lost grant (*Philipps v. Halliday*, 1891, A. C. 228; 61 L. J. Q. B. 210; *Stileman-Gibbard v. Wilkinson*, 1897, 1 Q. B. 749; 66 L. J. Q. B. 215).

(*q*) Claim of right to adulterate the water of a natural stream is a claim of a "watercourse" within this section (*Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Carlyon v. Lovering*, 1857, 1 H. & N. 784, 797; 26 L. J. Ex. 251; 108 R. R. 822). A claim to water which occasionally escapes from a lock is not a claim of a watercourse (*Staffordshire Co. v. Birmingham Co.*, 1866, L. R. 1

Prescription
Act.

water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption (*r*) for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing" (*s*).

Claim to the
use of light
enjoyed for
twenty years
indefeasible,
unless shown
to have been
by consent or
agreement in
writing.

Sect. 3. "And be it further enacted (*t*), That when the access (*u*) and use of light to and for any dwelling-house, workshop, or other building (*x*), shall have been actually enjoyed therewith (*y*) for the

H. L. 254; 35 L. J. Ch. 257), nor a claim to have water percolate through the banks of a river (*Roberts v. Fellowes*, 1906, 94 L. T. 279). A claim to go upon another man's close, and take water out of a spring there, is an easement.

(*r*) See the notes to s. 4.

(*s*) See, as to this consent, the notes to s. 3.

The questions as to the persons against whom and by whom the enjoyment must be had, including in particular the case of tenants for life or years occupying the dominant or the servient tenement, the case of a common owner of both tenements, and the necessity of presuming a grant, are all discussed in sect. 2 of this chapter. The qualities and character of the enjoyment necessary to give rise to a prescriptive title are discussed in sect. 3 (post, p. 221).

(*t*) The Crown, not being named in this section, is not bound by it (*Perry v. Eames*, 1891, 1 Ch. 658; 60 L. J. Ch. 345; *Wheaton v. Maple & Co.*, 1893, 3 Ch. 48; 62 L. J. Ch. 963).

(*u*) I.e., the access or freedom of passage over the servient tenement, as defined by the aperture in the dominant tenement. See *Scott v. Pape*, 1886, 31 Ch. D. 554; 55 L. J. Ch. 426; *Harris v. De Pinna*, 1886, 33 Ch. D. 238; 56 L. J. Ch. 344; *Aldin v. Latimer Clark & Co.*, 1894, 2 Ch. 437; 63 L. J. Ch. 601.

(*x*) As to what is a "building" within this section. A structure for storing timber is not within it (*Harris v. De Pinna*, 1886, 33 Ch. D. 238; 56 L. J. Ch. 344; see *Maberley v. Dowson*, 1827, 5 L. J. K. B. 261). Under the section the right may be acquired for a church (*Ecclesiastical Commrs. v. Kino*, 1880, 14 Ch. D. 213; 49 L. J. Ch. 529; *Anderson v. Francis*, 1906, W. N. 160; but see *Norfolk v. Arbutnot*, 1880, 5 C. P. D. 392; 49 L. J. C. P. 782); for an unconsecrated chapel (*A.-G. v. Queen Anne Co.*, 1889, 60 L. T. 759); for a picture gallery (*ib.*); and for a greenhouse (*Clifford v. Holt*, 1899, 1 Ch. 698; 68 L. J. Ch. 332).

(*y*) "Sect. 2 requires that the easements there mentioned shall have been enjoyed by persons 'claiming right thereto'; but in s. 3, which relates to the access of light, there is no such expression, and I think the omission is made purposely" (per Maule, B., in *Flight v. Thomas*, 1840, 11 A. & E. 695; 1 L. J. (N. S.) Ex. 529; 52 R. R. 468). It is now settled that it is not necessary that the actual enjoyment of light should have been "as of right" (*Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 484). But the access of light must be enjoyed as an easement, and therefore an enjoyment while the dominant and servient tenement are in the same occupation will not do (*Harbidge v. Warwick*, 1849, 3 Exch.

full period of twenty years without interruption (z), the right thereto shall be deemed absolute and indefeasible (a), any local usage or custom to the contrary notwithstanding (b), unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" (c).

Prescription Act.

552; 18 L. J. Ex. 245; 77 R. R. 725; *Ladyman v. Grave*, 1871, 6 Ch. 763).

The period of enjoyment begins as soon as the apertures are put in the dominant house, capable of being opened and shut and of admitting light. It is not necessary that the house should be occupied, or that the light should have been continuously admitted (*Courtauld v. Leigh*, 1869, L. R. 4 Exch. 126; 38 L. J. Ex. 45; *Cooper v. Straker*, 1888, 40 Ch. D. 21; 58 L. J. Ch. 26; *Collis v. Laugher*, 1894, 3 Ch. 659; 63 L. J. Ch. 851). The question whether there has been an actual enjoyment is a question of fact to be determined according to the circumstances of each case (*Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437). See *Hollins v. Verney*, 1884, 13 Q. B. D. 304; 53 L. J. Q. B. 430; quoted under s. 4, post. An alteration in the dominant building which would not involve the loss of a right to light when indefeasibly acquired will not prevent the acquisition of the right if made during the statutory period in which the right is in course of acquisition (*Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437; *Andrews v. Waite*, 1907, 2 Ch. 500; 76 L. J. Ch. 676).

(z) See notes to s. 4. The term interruption in this section bears the same meaning as in s. 4, and refers to an adverse obstruction, and not to a mere discontinuance of user (*Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437). A fluctuating interruption to light is not sufficient (*Presland v. Bingham*, 1889, 41 Ch. D. 268). A hoarding for the purpose of an interruption may be erected by a railway company (*Bonner v. G. W. R.*, 1883, 24 Ch. D. 1; see *Myers v. Catterson*, 1889, 43 Ch. D. 470; 59 L. J. Ch. 315; *Foster v. L. C. & D. R.*, 1895, 1 Q. B. 711; 21 L. J. Ch. 886), or by a local authority (*Paddington v. A.-G.*, 1906, A. C. 1).

(a) Having regard to these words, "absolute and indefeasible," it was said by Lord Westbury in the House of Lords that where the title to light is claimed under s. 3 it is not necessary to

presume a grant (*Tapling v. Jones*, 1865, 11 H. L. C. 304; 34 L. J. C. P. 342; 145 R. R. 192; *Jordeson v. Sutton Co.*, 1898, 2 Ch. 626; 68 L. J. Ch. 457). Again, where the servient tenement is in the occupation of a lessee for years, different persons owning the fee simple of the dominant and servient tenements, it has been laid down that where there has been an enjoyment of light for a sufficient period against the lessee the right is under the above section acquired as against all persons interested in the servient tenement, including the owner in fee (*Simper v. Foley*, 1862, 2 J. & H. 564; 134 R. R. 337). The difficult case where the fee simple in the dominant and servient tenements is owned by the same person, but the two tenements are in the occupation of different lessees, has been dealt with by the House of Lords, who have decided that under the above section the right to light can be acquired by one termor over land held by another termor under the same reversion (*Morgan v. Fear*, 1907, A. C. 429; 76 L. J. Ch. 660). This decision was arrived at in deference to the following authorities (which were discussed by the C. A. when *Fear v. Morgan* was before them: 1906, 2 Ch. 406; 75 L. J. Ch. 787), viz.: *Robson v. Edwards*, 1893, 2 Ch. 146; 62 L. J. Ch. 378; *Wheaton v. Maple*, 1893, 3 Ch. 48; 62 L. J. Ch. 963; *Frewen v. Philipps*, 1861, 11 C. B. N. S. 449; 30 L. J. C. P. 356; 132 R. R. 616; *Mitchell v. Cantrill*, 1887, 37 Ch. D. 56; 57 L. J. Ch. 72.

(b) *Cooper v. Hubbuck*, 1862, 12 C. B. N. S. 456; 31 L. J. C. P. 322; 133 R. R. 409; *Truscott v. Merchant Taylors' Co.*, 1856, *ubi sup.* The statute has not altered the law as to the nature and extent of light to which the dominant tenement is entitled (*Kirk v. Pearson*, 1871, 6 Ch. 809).

(c) The "agreement" need not necessarily be signed by the servient owner. One signed by the dominant owner was sufficient (*Bewley v. Atkinson*, 1879, 13 Ch. D. 283; 49 L. J. Ch. 153). So signature by a tenant of the domi-

Prescription Act.
Before-men-
tioned periods
to be deemed
those next
before some
suit wherein
a claim to
which such
periods relate
shall be
brought into
question.

Sect. 4. "And be it further enacted (d), That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question (e), and that no act or other

nant tenement was sufficient (*Hyman v. Van den Bergh*, 1907, 2 Ch. 531; 77 L. J. Ch. 154). But a stone built into the wall of the dominant tenement, and having inscribed upon it: "1816. This stone is placed by J. A. to perpetuate R. M.'s right to build within 9 inches of this and any other building," was held not to be a "consent or agreement expressly made or given for that purpose" (*Ruscoe v. Grounsell*, 1903, 89 L. T. 426). The grounds of this decision appear, from the judgment of Halsbury, L.C., to have been that the inscription did not unequivocally refer to light, but might have been placed in position for the purpose of preserving a boundary, or for some other reason. Where a lessor granted a lease of a house with the legal and reputed appurtenances, "except rights, if any, restricting the free use of adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise," these words, although sufficient to negative the implied grant of light, were not a "consent or agreement" within this section (*Mitchell v. Cantrill*, 1887, 37 Ch. D. 56; 51 L. J. Ch. 72; dict. *Haynes v. King*, 1893, 3 Ch. 439; 63 L. J. Ch. 21).

An agreement to pay rent for "windows" overlooking a property included a skylight (*Easton v. Isted*, 1903, 1 Ch. 405; 72 L. J. Ch. 189).

Cases in which the effect of an "agreement" has been discussed where questions of title subsequently arose between vendor and purchaser are referred to ante, p. 7.

(d) Note the qualification of this section by s. 7.

(e) The enjoyment which gives right under the Act is an enjoyment during the specified period which occurs immediately before the commencement of the action, and not before the injury complained of (*Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Richards v. Fry*, 1838, 7 A. & E. 698; 7 L. J. (N. S.) Q. B. 68; 45 R. R. 816; *Flight v. Thomas*, 1841, 8 Cl. & Fin. 242; 10 L. J. (N. S.) Ex. 529; 52 R. R. 468; per Lord Cotten-

ham, 54 R. R. 55; *Tilbury v. Silva*, 1890, 45 Ch. D. 98; *Colls v. Home Stores*, 1904, A. C. 189; 73 L. J. Ch. 484). But an enjoyment next before any action in which the claim is brought into question confers a right which may be set up in every subsequent action (*Cooper v. Hubbuck*, 1862, 12 C. B. N. S. 456; 31 L. J. C. P. 323; 133 R. R. 409).

In an action relating to light claimed under the statute, the Court refused, in computing this period, to exclude a time during which the light had been enjoyed by written consent (*Hyman v. Van den Bergh*, 1907, 2 Ch. 528; 1908, 1 Ch. 171). As to whether in such an action the Court can exclude from the period a time of unity of possession, see the dicta of Lord Hatherley, *Ladyman v. Grave*, 1871, 6 Ch. 768. In an action relating to a right of way claimed under the statute the Courts have held that a time of unity of possession cannot be excluded from the period (*Battishill v. Reid*, 1856, 18 C. B. 696; 25 L. J. C. P. 291; 107 R. R. 465; *Onley v. Gardiner*, 1838, 4 M. & W. 496; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704).

It had been suggested that in order to support the plea of enjoyment during the period, actual user must be proved in the first and in the last years of the period relied upon; see *Carr v. Foster*, 1842, 3 Q. B. 581; 11 L. J. (N. S.) Q. B. 284; 61 R. R. 321; *Bailey v. Appleyard*, 1838, 8 A. & E. 161; 7 L. J. (N. S.) Q. B. 145; 47 R. R. 537; *Parker v. Mitchell*, 1840, 11 A. & E. 788; 9 L. J. (N. S.) Q. B. 194; 52 R. R. 510. And in *Lowe v. Carpenter*, 1851, 6 Exch. 825; 20 L. J. Ex. 374; 86 R. R. 495, it was also suggested by Parke, B., that an act of user in every year of the period should be shown to have taken place. But in *Hollins v. Verney*, 1884, 13 Q. B. D. 304; 53 L. J. Q. B. 430, the Court of Appeal declined to recognize any such rule, and held the true rule to be that "a cessation of user which excludes an inference of actual enjoyment as of right for the statutory period will be fatal at whatsoever portion of the period the cessation occurs, and, on the other hand, a

matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year (*f*), after the party interrupted (*g*) shall have had or shall have notice thereof, and of the person making or authorizing the same to be made" (*h*).

Prescription Act.

cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning, or the end, of the period." In the last-mentioned case itself, the user had been so rare as not to raise an inference of continuous and open enjoyment during the statutory period. In *Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437, it was laid down that the question of enjoyment is in every case a question of fact to be determined according to the circumstances. Cf. per James, L.J., in *De la Warr v. Miles*, 1881, 17 Ch. D. 600; 50 L. J. Ch. 754; and see *Lawson v. Langley*, 1836, 4 A. & E. 890; 6 L. J. (N. S.) K. B. 271; 43 R. R. 513.

The dictum of Patteson, J., in *Payne v. Shadden*, 1834, 1 M. & Rob. 383; 42 R. R. 808, that the use of a way for ten years, and an agreement for the next ten to discontinue the user, retaining the right, would be sufficient under the Act, appears to be inconsistent with the decisions in the cases cited.

(*f*) An uninterrupted enjoyment of more than nineteen years cannot be defeated by an interruption, not acquiesced in, of less than a year (*Flight v. Thomas*, 1840, 8 Cl. & Fin. 231; 10 L. J. (N. S.) Ex. 529; 52 R. R. 468; see this case explained by Lord Campbell in *Eaton v. Swansea*, 1851, 17 Q. B. 272; 20 L. J. Q. B. 482). But the inchoate right will not be protected before the expiration of the full twenty years (*Bridewell v. Ward*, 1893, 62 L. J. Ch. 270; *Battersea v. Commissioners of Sewers*, 1895, 2 Ch. 708; 65 L. J. Ch. 81).

(*g*) "Sect. 4 speaks of the party interrupted. The statute seems to contemplate interruption of the right, not of the period" (per Parke, B., in *Flight v. Thomas*, 1840, 11 A. & E. 699; 10 L. J. (N. S.) Ex. 529; 52 R. R. 468).

(*h*) To constitute an interruption under this section, it is essential that there should be "an actual discontinuance" of the enjoyment in fact, by reason of an obstruction submitted to and acquiesced in for a year (*Plasterers' Co. v. Parish Clerks' Co.*, 1851, 6 Exch. 630; 20 L. J. Ex. 362; 86 R. R. 413). The interruption which defeats a right

under the Act is an adverse obstruction, not a mere discontinuance of user (*Smith v. Baxter*, sup.). An interruption from natural causes of the flow of a stream did not prevent prescription (*Hall v. Swift*, 1838, 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 7 R. R. 306; see *Carr v. Foster*, 3 Q. B. 585; 11 L. J. Q. B. 284; 61 R. R. 321). The interruption may be caused by the act of a stranger as well as by that of the servient owner (*Davies v. Williams*, 1851, 16 Q. B. 558; 20 L. J. Q. B. 339; 88 R. R. 592). A fluctuating interruption was not sufficient (*Presland v. Bingham*, 1889, 41 Ch. D. 268). The result of repeated interruptions in fact, though each too short to operate as "an interruption," as defined by this section, may yet be sufficient to show that the user all through was "contentious," and so not "as of right" (*Eaton v. Swansea*, 1851, 17 Q. B. 267; 20 L. J. Q. B. 482; 85 R. R. 455; and see *Rogers v. Taylor*, 1858, 2 H. & N. 828; 27 L. J. Ex. 173; 115 R. R. 835; *Warrick v. Queen's College*, 1871, 6 Ch. 728; 40 L. J. Ch. 780; and per Bowen, J., in *Dalton v. Angus*, 1881, 6 App. Cas. 786; 50 L. J. Q. B. 689).

Again, the result of interruptions may be to cause the acquisition of a qualified easement (*Rolle v. Whyte*, 1868, L. R. 3 Q. B. 286; 37 L. J. Q. B. 105).

As regards acquiescence in an interruption, it has been laid down that non-acquiescence is a question of fact for a jury (*Bennison v. Cartwright*, 1864, 5 B. & S. 1; 33 L. J. Q. B. 137; 136 R. R. 456). In order to negative submission it is not necessary to bring an action, or actively to remove the obstruction (*Glover v. Coleman*, 1874, L. R. 10 C. P. 108; see, however, the judgment of Kindersley, V.-C., in *Gale v. Abbot*, 1862, 10 W. R. 748). A person asserting an interruption must prove that some notice other than the mere existence of a physical obstruction was given to the person interrupted of the person interrupting (*Seddon v. Bank of Bolton*, 1882, 19 Ch. D. 462; 51 L. J. Ch. 512).

Prescription Act.

In actions on the case the claimant may allege his right generally, as at present.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the

Sect. 5. "And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this Act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right (*i*) by the occupiers of the tenement in respect whereof the same is claimed (*k*) for and

(*i*) Where a profit à prendre is claimed under s. 1, or an easement other than light is claimed under s. 2, it is settled that the enjoyment on which the claim is based (whether for the longer or shorter periods mentioned in the Act) must be alleged and proved to have been "as of right" (see p. 223, post). This is not necessary where a right to light is claimed under s. 3 (*Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 480).

(*k*) The words "the tenement in respect whereof the same is claimed," in this section, have given rise to a question whether rights in gross are within the statute and can be claimed under it.

The first and second sections expressly extend to "any claim which may lawfully be made, by custom, prescription, or grant, at the common law." It is beyond all doubt that rights in gross to profits à prendre may be claimed by prescription at common law; see *Barrington's case*, 1610, 8 Rep. 36 b; *Johnson v. Barnes*, 1873, L. R. 8 C. P. 527; 42 L. J. C. P. 259; *Devonshire v. Pattinson*, 1888, 20 Q. B. D. 274; 57 L. J. Q. B. 189; *Neill v. Devonshire*, 1882, 8 App. Cas. 153. Again, it seems that rights in the nature of easements not annexed to any particular tenement may be claimed by custom (*Brocklebank v. Thompson*, 1903, 2 Ch. 348; 72 L. J. Ch. 626); and possibly by prescription (*Foster v. Warblington*, 1906, 1 K. B. 664; 75 L. J. K. B. 514). Rights in gross are equally within the mischief against which the Act was directed, and ought not, it was said, to be held excluded merely because the form of pleading mentioned in s. 5 is only

appropriate to rights appurtenant. Parke, B., in *Welcome v. Upton*, 1839, 5 M. & W. 404; 8 L. J. (N. S.) Ex. 267; 52 R. R. 762, 767, says: "I am not sure that by a liberal construction of the fifth section it might not be made to include them," i.e., rights in gross. The question was considered but not decided in *Bailey v. Stephens*, 1862, 12 C. B. N. S. 113; 31 L. J. C. P. 226; 133 R. R. 295, and *Mounsey v. Ismay*, 1865, 3 H. & C. 498; 34 L. J. Ex. 52; 140 R. R. 567. But in *Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687; 34 L. J. C. P. 309; 147 R. R. 721, it was decided that such a right is not within the Act. The defendant there claimed that he and his ancestor had for thirty and sixty years before the action enjoyed the right of fishing in Coniston Lake, and landing their nets on its banks. The Court held the plea bad. They said that the fifth section gave the key to the true construction of the Act. It "professes to enact forms of pleading applicable to all rights within the Act theretofore claimed to have existed from time immemorial, which forms it declares shall in such cases be sufficient. Those forms have clear relation to rights which are appurtenant to land, and to such rights only. The whole principle of the pleading assumes a dominant tenement, and an enjoyment as of right by the occupiers of it. The proof must, of course, follow and support the pleading. It is obvious that rights claimed in gross cannot be so pleaded or proved." This decision was followed by *Farwell, J.*, in *Mercer v. Denne*, 1904, 2 Ch. 534, 540; 74 L. J. Ch. 723; affd. 1905, 2 Ch. 538; and by *Buckley, J.*, in *Ramsgate v. Debling*,

during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or (l) on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation" (m).

Sect. 6. "And be it further enacted, That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim" (n).

Sect. 7. "Provided also, That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation

Prescription Act.

period mentioned in this Act may be alleged; and exceptions or other matters be replied specially.

No presumption to be allowed for shorter periods than are herein mentioned as applicable.

Proviso for disabilities.

1906. 22 T. L. R. 369. In *Mercer v. Denne*, on appeal, 1905, 2 Ch. 538; 74 L. J. Ch. 723, the decision of Farwell, J., was affirmed upon grounds which rendered the consideration of this point unnecessary, and the point was expressly kept open by Stirling, L.J.; see p. 586.

(l) The disabilities mentioned in s. 7 fall within this alternative, even if they are excluded from the first branch of the alternative by the use of the word "hereinbefore."

(m) As to the meaning and effect of the concluding words of this section, the modifications in pleading introduced thereby, and the present rules of pleading, see Part VI., Chap. 2, sect. 2, post.

(n) See *Bright v. Walker*, 1834, 1 C. M. & R. 211; 3 L. J. (N. S.) Ex. 250; 40 R. R. 536. The meaning of the sixth section seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but, where there are other circumstances in

addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant (*Hammer v. Chance*, 1865, 4 D. J. & S. 631; 34 L. J. Ch. 413; 146 R. R. 488). Thus evidence of taking vitreous sand from copyhold tenements by copyholders for less than thirty years coupled with evidence of taking other sand from the copyhold for more than thirty years was sufficient to prove an immemorial custom to take sand generally (ib.).

Again, acquiescence by the owner of the servient tenement in the expenditure of money by the owner of the dominant tenement may have weight in preventing the former from interfering with the enjoyment of an easement; see *Rochdale Co. v. King*, 1851, 2 Sim. N. S. 88; 20 L. J. Ch. 675; 89 R. R. 211.

Prescription Act.

Time excluded in computing the term of forty years appointed by this Act in favour of the reversioner of the servient tenement.

of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible" (o).

SECT. 8. "Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (p) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years (q), in case the claim

(o) SECT. 7 must be read with s. 4, and the period of any tenancy for life must be excluded if properly pleaded in the computation of the periods of thirty and twenty years (*Clayton v. Corby*, 1842, 2 Q. B. 813; 57 R. R. 807; *Pye v. Mumford*, 1848, 11 Q. B. 666; 17 L. J. Q. B. 138; 75 R. R. 582). It appears from these cases (decided under the old rules of pleading) that if the tenancy for life be replied to a plea of enjoyment under the Act, the defendant may show, by way of rejoinder, that he has had an enjoyment for the required period, excluding the time of that tenancy, such period being "constructively" next before the suit; but that if the plaintiff does not reply the tenancy, but simply traverses the enjoyment, the case will be determined as if there had been no tenancy for life at all. See also the observations of Parke, B., in *Onley v. Gardiner*, 1838, 4 M. & W. 500; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704; as to the effect of excluding the period, being in effect to increase the total required period of enjoyment, and not simply to connect two discontinuous periods absolutely excluding the time of disability.

In s. 7 no provision is made for the case of a person being beyond the seas during the whole or any part of the period of prescription. But in such a case, although the time of such absence could not be excluded under s. 7, the fact might be used to show ignorance on the part of the servient owner of the fact of the enjoyment, so as to bring the case within the rule as to knowledge stated in sect. 3, post.

Again, apart from exclusion in the computation of the periods of enjoyment, the circumstances referred to in s. 7 might be used for the purpose of

defeating a claim to an easement by bringing the case within some of the other rules laid down in sect. 3, post.

(p) See below, p. 207.

(q) The Court of Queen's Bench (*Palk v. Shinner*, 1852, 18 Q. B. 568; 22 L. J. Q. B. 27; 88 R. R. 703) held that the eighth section applies only to the period of forty years, and therefore that the time during which the premises are under lease for a term exceeding three years is not to be excluded in the computation of the period of twenty years' enjoyment of a right of way. But the question whether the tenancy for years, though *not to be absolutely excluded* under s. 8, might not be made use of in another way to defeat the user, is a different matter.

In *Palk v. Shinner* a way had been used for twenty years, during the first fifteen of which the servient tenement had been under lease; and it did not appear whether the reversioner knew of the user during the lease, but at all events no resistance was made either during the fifteen years or the remaining years for which the land was in possession of the reversioner. Erle, J., told the jury that the fact of the land having been in lease for the fifteen years would not defeat the user; and, upon a rule nisi for a new trial for misdirection, the question principally argued was whether the eighth section of the statute applied to a twenty years' user, so that the tenancy should be *excluded*, and the Court expressed a clear opinion that it did not; but Erle, J., said, if this case had arisen before the statute, "there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy."

It should seem that any objection in

shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof" (r).

Prescription Act.

Sect. 9. "And be it further enacted, That this Act shall not extend to Scotland [or Ireland]" (s).

Not to extend to Scotland.

As regards the effect of the Prescription Act generally, it is clear that, with the exception of the right to light, two distinct periods of user with respect to easements are specified by the Act. As far as concerns the shorter period fixed—an enjoyment for twenty

Effect of Act.

respect of the land having been in lease which might have been taken at the common law may still be taken to a user for twenty years under s. 2 of the statute, although the statutory process of excluding the time of the lease is not open except in the case of forty years' user.

On the other hand, in the case of forty years' user, unless the reversioner should resist the claim within three years from the termination of the tenancy, he could not set up the existence of the lease in any way. He could not set it up by way of exclusion from the computation by reason of the express condition, imposed by s. 8, of resisting within the three years above mentioned. Nor could he set it up as at the common law by reason of the provisions of s. 2, which, though they allow a twenty years' user to be defeated "in any other way" in which the same at the common law might be defeated, do not allow the forty years' user to be so defeated, but only by showing that the enjoyment was had under a written agreement. So that but for the eighth section the reversioner could make no use of the fact of the tenancy at all.

In short, there are two distinct ways in which the existence of a term of years may be taken advantage of:—

1. As showing, in connection with the other circumstances of the case, that there has not been enjoyment binding against the reversioner, ex. gr. as in the case of an enjoyment for twenty years, commencing during tenancy and continued through it, and not known to him and his agents.

2. As entitling the reversioner to have the period of enjoyment during the term *excluded* from the period of computation, so as virtually to extend

the period of enjoyment required to be proved.

The first way was open at the common law, and is left untouched by the statute in so far as the period of twenty years' user under s. 2 is concerned, but is not left in the case of the forty years' user. The second way is the creature of the statute, and, according to the case of *Palk v. Shiner*, is only applicable to a case of forty years' user. But if the person resisting the claim does not, by resisting it within three years from the end of the term, comply with the condition upon which alone he can under the eighth section take advantage of the statutory mode of altogether excluding the term from the computation of the period of enjoyment, he is debarred from setting up the fact of the existence of the tenancy for years at all.

[The above note appears to have been added by Mr. W. H. Willees to the original treatise. See the Preface to the 3rd edition of this Treatise, and the 4th edition, p. 183.]

(r) In *Symons v. Leaker*, 1885, 15 Q. B. D. 629; 54 L. J. Q. B. 480; Field and Manisty, JJ., acting upon an opinion expressed by Jessel, M.R., in *Laird v. Briggs*, 1881, 19 Ch. D. 22; 50 L. J. Ch. 260, held that "reversion" does not include "remainder."

(s) By 21 & 22 Vict. c. 42 the Act is extended to Ireland from and after the 1st January, 1859. And by 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874) the words "or Ireland" are struck out of s. 9; and s. 10, which enacts that the Act shall commence and take effect on the first day of Michaelmas term then next ensuing, and s. 11, which allows it to be amended during the session, are repealed.

Prescription
Act.

years—the statute seems to be merely a declaration in accordance with the law as it before stood (*t*); it enacted only that the right should not be defeated by showing the commencement of such enjoyment to have been within the time of legal memory, but allowing such enjoyment to be defeated in any other way by which its effect might previously have been destroyed. The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of enjoyment of an easement, declaring that enjoyment for that time shall give an absolute and indefeasible right (*u*), notwithstanding any personal disability on the part of the owner of the servient inheritance (see s. 7), unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

Exception for
disabilities.

Sect. 4 provides that in all cases in which an easement is claimed under the statute by user such user must be shown to have existed during the requisite periods immediately preceding the commencement of some action wherein the claim or matter to which such period may relate shall come in question. Under s. 8, however, where the servient tenement upon, over, or from which any such way, or other convenient watercourse or use of water, shall have been or shall be claimed or derived, has been held during the whole or any part of the forty years, “under any term of life or any term of years exceeding three years from the granting thereof,” “the time of the enjoyment during the continuance of such term shall be excluded in the computation,” provided that the claim to the easement founded on the enjoyment shall be resisted by the reversioner within three years after the determination of such term (*x*).

The peculiar language of s. 8 must be observed. It is not in terms extended to every description of easement as in the second section, but is confined “to a way or other convenient water-

(*t*) In *Palk v. Shinner*, ubi sup., Erle, J., said “the statute makes no difference in the modes of defeating the user, except that it provides that it shall not be defeated by proof of origin at some time prior to the twenty years.” But the proposition in the text must be taken with some qualification, in consequence of the provisions of s. 4, and the decisions thereupon, the effect of which is to expose the claimant to some difficulties first introduced by the Act, and mentioned ante, p. 197, note.

(*u*) Sect. 2. This paragraph in the text deals only with the acquisition of easements under s. 2, but it is appli-

cable also to the acquisition of profits à prendre under s. 1, with the substitution of the sixty years mentioned in that section for the forty years mentioned in this paragraph of the text.

(*x*) *Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Onley v. Gardiner*, 1838, 4 M. & W. 496; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704; *Richards v. Fry*, 1838, 7 A. & E. 698; 7 L. J. (N. S.) Q. B. 68; 45 R. R. 816; *Jones v. Price*, 1836, 3 Bing. N. C. 52; 3 Scott, 376; *Laird v. Briggs*, 1881, 19 Ch. D. 22; 50 L. J. Ch. 260; *Symons v. Leaker*, 1885, 15 Q. B. D. 629; 54 L. J. Q. B. 480.

course or use of water." "No doubt," said Parke, B., in *Wright v. Williams* (y), "there is a mistake in the eighth section, probably a miscopying in the insertion of the word 'convenient' instead of 'easement.' " If the word easement were substituted, as suggested by the learned judge, the language of the two sections would be identical. No case has yet arisen in which the Courts have been called upon to decide whether effect could be given to the presumed intention of the Legislature, or whether the exemption must be strictly confined to the two kinds of easement mentioned in the statute (z). It may, however, be suggested that by reading "convenience" instead of "convenient," a word which in the old books is synonymous with easement, the language would be sufficient to give effect to the intentions of the framers of the statute, without any violent perversion of the words.

Prescription
Act.

After an enjoyment of forty years, the extent of the exemption contained in the eighth section appears to amount to this:—The period during which the owner of the servient inheritance has not been "valens agere," in consequence of the existence of a lease for life or for more than three years, is altogether excluded in the computation of the forty years, provided such owner contests the claim within three years after the lease expires. If the first twenty of the forty years' enjoyment occurred at a time when the servient tenement was not held under lease, it seems that the owner of the servient inheritance (even though he brought his action within three years from the expiration of the lease) would be prevented by a twenty years' valid enjoyment from successfully challenging the claim to an easement. Again, if the servient tenement had been held without lease during the first eighteen and the last two of the forty years, being held under lease during the intervening twenty years, it would seem that the owner of the servient inheritance would be equally prevented by a twenty years' valid enjoyment from successfully challenging the claim. The time of enjoyment during the leases is simply to be excluded, and there appears to be nothing to prevent the tacking together of the two periods of eighteen and two years during which there has been a valid

(y) 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265. The suggestion does not appear by the report to have been made by the judge in this case; but it is found in counsel's arguments, as reported in Tyr. & Gra. at p. 390.

(z) See *Lyde v. Barnard*, 1836, 1 M. & W. 101; 5 L. J. (N. S.) Ex. 117; 46

R. R. 269; observations of the judges upon the word "upon" in stat. 9 Geo. 4, c. 14, s. 6; and *Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265. In *Laird v. Briggs*, 1881, 19 Ch. D. 22; 50 L. J. Ch. 260, the point was expressly kept open by the Court of Appeal.

Prescription
Act.

enjoyment. This point, it is true, has not yet arisen ; but the case appears by the express enactment of the statute—that the time during which the property was so held on lease shall be excluded from the computation of the period of forty years—to be exempted from the rule requiring twenty years' enjoyment next before action brought (*a*).

Supposing, then, that the period during which the servient tenement has been so in lease is simply to be excluded in the computation of the time, and to be considered in law as though it had never been, a further question arises whether the user, during the remaining twenty years, when there was no such demise, can be defeated as in ordinary cases ; for instance, by showing that the owner of the inheritance was during the whole or part of that time under a disability. By the seventh section, the provision in favour of disabilities does not apply to the cases “ where the right or claim is declared to be absolute and indefeasible ” ; and it may be urged that the policy of the law is, after so long an enjoyment, to clothe such user with the legal right without allowing the general object to be defeated by too minute provisions. To this, however, it may be replied that if the period of the subsistence of the lease is to be excluded, the reversioner does not obtain complete protection unless he stands in the same position to all intents and purposes as he would do in the ordinary case of a user of twenty years, when the servient tenement was not under lease. And the words of the seventh section of the statute may be satisfied by supposing it to mean only that, in the computation of the period of forty years, for the purpose of throwing upon the owner of the inheritance the onus of showing that he was under the particular disability of a reversioner, no time of general disability is to be deducted ; but that the fact of his being a reversioner being once established, and the question, therefore, then being whether there has been a valid user of twenty years, that must be decided as if it stood completely abstracted from the time during which the servient tenement was in lease ; or that, in other words, in computing the period of forty

(*a*) The views of the author are confirmed by *Clayton v. Corby*, 1842, 2 Q. B. 813 ; 11 L. J. (N. S.) Q. B. 239 ; 57 R. R. 807, and *Pye v. Mumford*, 1848, 11 Q. B. 675 ; 17 L. J. Q. B. 138 ; 75 R. R. 582, upon the effect of excluding the periods of disability under s. 7. They are excluded for the benefit of the person resisting the claim, and not of the person setting it up. If, therefore, there has in fact been an

interruption by the tenant for life or other occurrence during the tenancy affecting the enjoyment, this may be shown, in order to defeat the claim, and the claimant could not get rid of the objection by saying that the tenancy was to be excluded in his favour, so as to shut out such objection. See also the judgment of the C. A., *Hollins v. Verney*, 1884, 13 Q. B. D. 304 ; 53 L. J. Q. B. 430.

years, disability under s. 7 shall never be deducted—in computing that of twenty years, always, if properly set up in the pleading (*b*). Prescription Act.

With regard to light, by the third section, twenty years' uninterrupted enjoyment (*c*) confers an absolute and indefeasible right, with the single exception of the case in which such enjoyment was had under written agreement. The eighth section of the statute does not in terms apply to the easement of light, and the only period of time there mentioned is "forty years." In *Palk v. Shinner* (*d*), the judges were clearly of opinion that s. 8 does not apply to the period of twenty years.

By the construction given to s. 4 of the statute, enacting "that no act or matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall be submitted to or acquiesced in for one year after the party shall have had or shall have notice thereof," an enjoyment for the full period, minus any time less than a year, has been construed to give, after the expiration of the full period of twenty years, a right.

An opinion seems, on one occasion, to have been expressed, that, before the statute, a licence might be presumed from a length of user insufficient to raise the presumption of a grant, so as to justify the exercise of an affirmative easement until such licence was countermanded (*e*). Such a case is now governed by s. 6, which enacts, That no presumption shall be made in favour of any claim from the exercise or enjoyment of the thing claimed during a shorter period than that specified by the statute (*f*).

No title given by enjoyment during shorter time.

(*b*) The judgments in *Clayton v. Corby* and *Pye v. Mumford* (ante, p. 208, note), fully establish the propositions contended for by the author. There are in short two distinct modes of making out a right to an easement under the second section, one by twenty years' user and another by forty years' user. If the twenty years' user be pleaded, and a tenancy for life be replied, it is competent for the claimant, by s. 7, to rejoin and prove a twenty years' user (excluding the time of the tenancy for life), and if he do not he will fail. If the forty years' user be set up, and a tenancy for life or for years be replied, the claimant is driven, by s. 8, to rejoin and prove a forty years' user, excluding those periods. But whether the claimant relies upon a twenty years' user by reason of his not having in fact had a user for forty years, or by reason that the provisions of s. 8 furnish an answer to his forty years'

user, is quite immaterial. And the question whether there has been a good twenty years' user in the one case constructively, in the other actually, next before the suit, must be decided in each case according to the same rules.

(*c*) Of the access of it as an easement, see *Harbidge v. Warwick*, 1849, 3 Exch. 552; 18 L. J. Ex. 245; 77 R. R. 725; and see above, p. 196, note (*l*).

(*d*) 1852, 18 Q. B. 568; 22 L. J. Q. B. 27; 88 R. R. 703.

(*e*) *Doe d. Foley v. Wilson*, 1809, 11 East, 56.

(*f*) See the observations of Patteson, J., in *Carr v. Foster*, and Parke, B., in *Low v. Carpenter*, cited ante, p. 200, *Hollins v. Verney*, 1884, 13 Q. B. D. 304; 51 L. J. Q. B. 430; *Bonner v. G. W. R.*, 1883, 24 Ch. D. 1. But an inchoate right may be the subject of compensation under the Lands Clauses Acts (*Re London and Tilbury Co.*,

Prescription
Act.

Inter præ-
sentes et
absentes.

Code Civil.

The period of prescription fixed by the civil law was ten years where the party sought to be charged was present, and twenty where he was absent.

By the French Code (civil thirty years' user is sufficient to confer a title to all those easements which are, from their nature, susceptible of being claimed by prescription (*g*).

SECT. 2.—*The Persons against whom and by whom the Enjoyment must be had to give rise to a prescriptive Title.*

A. Against whom the enjoyment must be had.

Persons
against whom
the enjoy-
ment must be
had.

As it is essential, wrote Mr. Gale, to the existence of an easement, that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement is to be acquired must be by a person in possession of the dominant tenement. And as such user is only evidence of a previous grant—and as the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement—it follows that by the common law such grant can only have been legally made by a party capable of imposing such a permanent burden upon the property—that is, the owner of an estate of inheritance (*h*). Further, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed. His abstaining from interference will then be construed as an acquiescence (*i*). *Contra non valentem agere non currit præscriptio*.

In the above paragraph Mr. Gale referred to two distinct points, viz.: (1) the servient owner's interest in the servient tenement; and (2) such owner's knowledge of the user of the easement. In the present section it is proposed to deal with the first of these points; the second will be dealt with in s. 3.

As regards the interest in the servient tenement which, in the case of easements acquired by express grant, must be possessed by the grantor of the easement at the date of the grant, the nature and amount of this interest has been already discussed (*j*). In the case of easements acquired by prescription we now consider a similar

188), 24 Q. B. D. 326; 59 L. J. Q. B. 152; *Barlow v. Ross*, 1890, 24 Q. B. D. 381; 59 L. J. Q. B. 183).

(*g*) Pardessus, *Traité des Servitudes*, 424.

(*h*) *Daniel v. North*, 1809, 11 East, 372.

(*i*) *Gray v. Bond*, 1821, 2 Brod. & Bing. 667; 23 R. R. 530.

(*j*) Ante, p. 33.

question, viz., what interest in the servient tenement must, during the enjoyment of the easement, be possessed by the servient owner so as to give rise to a prescriptive title.

Person against whom the enjoyment must be had.

According to the common law, all prescription presupposes a grant (*k*), and (apart from the special case of light claimed under s. 3 of the Act, and apart also from the doubtful question whether a grant must be presumed in the case where an easement is claimed under s. 2 of the Act on the ground of an enjoyment for the forty years mentioned in that section) the general rule is that to establish a prescriptive title to an easement the Court must presume a grant of the easement by the absolute owner of the servient tenement to the absolute owner of the dominant tenement (*l*). And for the purpose of such grant it must be shown that there was a capable grantor and a capable grantee. An enjoyment of the easement as against an owner of the servient tenement who could not dispose of the fee will not be sufficient.

In connection with this question the provisions in ss. 7 and 8 of the Prescription Act in relation to tenants for life and for years and to persons under disability must, where the claim is made under the Act, be carefully borne in mind. For instance, disability on the part of the servient owner might prevent the presumption of a grant. But the general doctrine requires to be considered more in detail.

We have seen that the Prescription Act has not taken away any of the methods of claiming easements which previously existed (*m*). And in dealing with the present question it is important to distinguish the method in which the particular easement is claimed. As to this it should be noted that there are three legal methods in which prescriptive rights can be claimed, viz. (1) prescription at common law; (2) claims based on lost grant; and (3) prescription under the Act.

First, then, in the case of an easement claimed by prescription at common law there must have been enjoyment as against an absolute owner of the servient tenement. It was laid down by Lindley, L.J. (in a case where the easement of light was in question), that a right claimed by prescription must be claimed as appendant or appurtenant to land and not as annexed to it for a term of years; also that an easement for a limited time only cannot be gained by prescription

(1) Claims based on prescription at common law.

(*k*) *Gardner v. Hodyson's Co.*, 1903, A. C. 239; 72 L. J. Ch. 558; *Goodman v. Saltash*, 1882, 7 App. Cas. 654, 655; 52 L. J. Q. B. 193.

(*l*) *Wheaton v. Maple*, 1893, 3 Ch. 63; 62 L. J. Ch. 963; *Kilgour v. Gaddes*, 1904, 1 K. B. 466; 73 L. J. K. B. 233.

There is also a doubt as to the nature of the lost modern grant which in certain cases the Courts have held ought to be presumed. See post, pp. 213, 214.

(*m*) Ante, p. 193

Persons
against
whom the
enjoyment
must be had.

(2) Claims
based on lost
grant.

at common law (*n*). Vaughan Williams, J., seems to have been of opinion that by prescription at common law a right to light can only be acquired between absolute owners (*o*). Again, it was said by Mathew, L.J. (referring to a right of way), that such an easement can only be acquired by prescription at common law where the dominant and servient tenements respectively belong to different owners in fee (*p*). And it results from the words of Mathew, L.J., last quoted that where the fee simple in both dominant and servient tenements belongs to the same owner no easement can be acquired by prescription at common law (*q*).

Secondly, where the claim to an easement is based on the doctrine of lost grant, it would seem to follow from the language used by Lindley, L.J., in the above-mentioned case of *Wheaton v. Maple* (*r*) that the same rule should apply, and that an enjoyment as against an owner of the servient tenement who cannot dispose of the fee is not sufficient. In *Barker v. Richardson* (*s*), where the light of a presumably modern house had been enjoyed for more than twenty years over land which during part of that period had been glebe land, no easement was acquired; the ground of the decision being thus stated by Abbott, C.J.: "Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case the grant if presumed must have been made by a tenant for life who had no power to bind his successor; the grant therefore would be invalid."

Again, Mr. Serjeant Williams says: "Though an uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant; yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate *of inheritance*. For if a tenant for term of years, or life, permits another to enjoy an easement on his estate for twenty years or upwards, without

(*n*) *Wheaton v. Maple*, 1893, 3 Ch. 63, 65; 62 L. J. Ch. 963.

(*o*) *Fear v. Morgan*, 1906, 2 Ch. 415, 416; 75 L. J. Ch. 787.

(*p*) *Kilgour v. Gaddes*, 1904, 1 K. B. 467; 73 L. J. K. B. 733.

(*q*) See ante, p. 14.

(*r*) Ubi sup.

(*s*) 1821, 4 B. & Ald. 582; 23 R. R. 406. Compare *Runcorn v. Doe*, 1826, 5 B. & C. 696; 4 L. J. K. B. 281—a case of adverse possession under the old Statutes of Limitation. It should be noted that in *Barker v. Richardson* the incapacity of the owner of the

servient tenement to make an absolute grant covered only part of the period of enjoyment. So again in *Roberts v. James*, 1903, 89 L. T. 287, an absolute grant could at one time during the enjoyment have been made by the owners of the servient tenement. But in both cases the Court refused to presume a grant. See, however, the words of Lord Westbury (as to the necessity of showing a capable grantor) in *Staffordshire Co. v. Birmingham Co.*, 1866, L. R. 1 H. L. 278; 35 L. J. Ch. 257.

interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession he may dispute the right to the easement, and the length of possession will be no answer to his claim. Thus, where A., being a tenant for life, with a power to make a jointure, which he afterwards executed, gave licence to B., in 1747, to erect a wear on the river T. in A.'s soil, for the purpose of watering B.'s meadows, and then A. died, and the jointress entered and continued seised down to the year 1799, when the tenant of A.'s farm diverted the water of the river from the wear; upon which the tenant of B.'s farm brought an action on the case for diverting the water; it was held by the Court of King's Bench that the uninterrupted possession of the wear for so many years, with acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion" (t).

Persons
against
whom the
enjoyment
must be had.

The ruling in *Bradbury v. Grinsell* was applied by the Court of Appeal in the modern case of *Roberts v. James* (u), where it was laid down by Romer, J., as clear law that, where a tenant for life is in possession of the servient tenement, a lost grant of a right of way cannot be implied as against the reversioner merely from the user of the way during the life tenancy. The same doctrine was applied where the easement of light was claimed over a servient tenement in the possession of a tenant for years (v).

On the other hand, if (as it seems) the method of claiming easements by the doctrine of lost grant as that doctrine existed before the Prescription Act has remained unaffected by the Act, there appears to be some doubt as to the rule. In *Bright v. Walker* (x), where a lessee holding the dominant tenement claimed a right of way on the ground of user over a servient tenement also held by a lessee, Parke, B., referring to the old doctrine of lost grant, stated that user for twenty years would before the Prescription Act have been evidence to support a claim by a non-existing grant from the termor in the locus in quo to the termor under whom the plaintiff claimed, although such a claim was by no means a matter of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee. Again, in referring to the doctrine of lost grant, it was said by Channell, J., (y),

(t) *Bradbury v. Grinsell*, 2 Wms. Saund. 509.

(u) 1903, 89 L. T. 287.

(v) *Daniel v. North*, 1809, 11 East, 370. Compare *Cross v. Lewis*, 1824, 2 B. & C. 686; 2 L. J. (O. S.) K. B.

136.

(x) 1834, 1 C. M. & R. 211, 221; 3 L. J. (N. S.) Ex. 250; 40 R. R. 536.

(y) *East Stonchouse v. Willoughby*, 1902, 2 K. B. 333; 71 L. J. K. B. 873.

Persons
against
whom the
enjoyment
must be had.

that in recent times the doctrine had been applied more widely than formerly. "In particular it can be applied between termors when there is a difficulty in applying the statute owing to the freeholder not being bound." Lastly, in Ireland it has been held in a series of cases that there may be a presumption of a lost grant which is binding on termors, and on termors only (z).

The case where the fee simple in both the dominant and servient tenements belongs to the same owner is a special one. The question of presuming a lost grant in such a case is in England governed by the rules that a lessee for years must prescribe in his lessor and not in himself; and that the lessor cannot have an easement over his own land (a). The rule in Ireland is discussed in *Hanna v. Pollock* (b).

(3) Claims
under the
Prescription
Act.

Thirdly, where an easement is claimed by prescription under the Act. Here it is necessary to make a further distinction between the cases where a claim is made to an easement other than light and the case where a claim is made to light.

a. To ease-
ments other
than light.

(a) On the
ground of
twenty years'
enjoyment.

a. As to the case where a claim is made under the Act to an easement other than light. The claim may be based on twenty years' enjoyment; and upon such a claim the leading authority is the above-mentioned case of *Bright v. Walker*, where for more than twenty years the plaintiff, holding Blackacre under a lease for lives from a bishop, enjoyed without interruption a way over Whiteacre held by the defendant under a lease for lives from the same bishop. An action was subsequently brought in which the plaintiff claimed the right of way under the Prescription Act, but the claim failed. Parke, B., delivered the judgment of the Court of Exchequer, in which he said: "The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the locus in quo, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the fee. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the locus in quo to the termor under whom the plaintiff claims, though such a claim was

(z) See *Flynn v. Harte*, 1913, 2 I. R. 326, where the decisions are reviewed by Dodd, J.

(a) See ante, p. 14.

(b) 1900, 2 I. R. 664.

by no means a matter of ordinary occurrence ; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But, since [i.e., in a claim under] the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is ' for shortening the time of *prescription* ' ; and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all ; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant " (c).

Persons against whom the enjoyment must be had.

In *Bright v. Walker* (d), the enjoyment had continued during twenty years only. The claim, however, may be based on a forty years' enjoyment. And as to this Mr. Gale expressed the opinion, that such an enjoyment would confer a right to the easement subject to the condition only that the reversioner interfered within three years after the determination of the particular estate ; as in the cases of conditional estates, a valid right is given as against all the world, until by the happening of the conditions the estate is defeated.

(b) On the ground of forty years' enjoyment.

In *Wright v. Williams* (e) (a case relating to water rights which was argued on demurrer) Parke, B., during the course of the argument said that it was the intention of the Prescription Act that an enjoyment of twenty years should be of no avail against an idiot or other person labouring under incapacity, but that one of forty years should confer an absolute title even as against parties under disabilities. He said also that a user for forty years confers a *prima facie* title which is good, unless the reversioner pursues his remedy within the three years mentioned in s. 8. And, in delivering the judgment of the Court of Exchequer, Lord Abinger held that, even where a tenancy for life existed, the enjoyment of an easement for

Wright v. Williams.

(c) *England v. Wall*, 1842, 10 M. & W. 699.

(d) 3 L. J. Ex. 250.

(e) 1836, 1 Tyr. & G. 375 (see pp. 392, 393, 403) ; 5 L. J. Ex. 107 ; 46 R. R. 265.

Persons
against
whom the
enjoyment
must be had.

forty years gave an indefeasible title. It seems to follow that, in the opinion of the then judges of the Court of Exchequer, it was not necessary to presume an absolute grant where a claim under the Act to an easement other than light was based on a forty years' enjoyment. This question is further discussed later on.

Where the fee simple in both the dominant and servient tenements belongs to the same owner, it is clear that (apart from questions as to light discussed later) the tenant of one close cannot as such acquire under the Act a prescriptive easement over another close belonging to the same landlord either by twenty years' user (*f*), or by forty years' user (*g*).

f. Claims
under Pre-
scription Act
to light.

β. As to the case where a claim is made under s. 3 of the Act to the easement of light. In this case it is settled that an enjoyment as against an owner of the servient tenement who cannot dispose of the fee may be sufficient. For it is not necessary to presume an absolute grant. This result follows from the words of s. 3, as to which Lord Westbury laid down in the House of Lords that the right to light now depends on positive enactment. "It is a matter juris positivi and does not require and therefore ought not to be rested on any presumption of grant" (*h*).

Where the servient tenement is in the occupation of a lessee for years, and different persons own the fee simple of the dominant and servient tenements, the rule laid down by Wood, V.-C., applies, that where there has been an enjoyment of light for a sufficient period as against the owner of a leasehold interest, the right is under s. 3 of the Act acquired as against all persons interested in the servient tenement, including owners in fee (*i*).

On the other hand, the case where the fee simple in the dominant and servient tenements is owned by the same person, but the two tenements are in the occupation of different lessees, and the enjoyment takes place during such occupation, has given rise to much discussion. It has now been held by the House of Lords that under

(*f*) *Gayford v. Moffatt*, 1868, 4 Ch. 133; *Bagley v. G. W. R.*, 1884, 26 Ch. D. 441; *Sturges v. Bridgman*, 1879, 11 Ch. D. 855; 48 L. J. Ch. 785.

(*g*) *Kilgour v. Gaddes*, 1904, 1 K. B. 457; 73 L. J. K. B. 233. The rule stated above is the result of the decisions of the Courts in England. The rule in Ireland may be different: see *Hanna v. Pollock*, 1900, 2 I. R. 664; *Macnaghten v. Baird*, 1903, 2 I. R. 731; *Flynn v. Harte*, 1913, 2 I. R. 326.

(*h*) *Tapling v. Jones*, 1865, 11

H. L. C. 304; 34 L. J. C. P. 342; 145 R. R. 192. See *Jordeson v. Sutton Co.*, 1898, 2 Ch. 614, 618, 626; 68 L. J. Ch. 457 (where the servient tenement belonged to a gas company, as to whom it was objected that they were under a statutory incapacity to grant the right of light, and North, J., overruled the objection, holding that no presumption of grant was necessary).

(*i*) *Simper v. Foley*, 1862, 2 J. & H. 564; 134 R. R. 337; *Ladyman v. Grave*, 1871, 6 Ch. 769.

s. 3 the right to light can be acquired by a termor over land held by another termor under the same reversion (*j*). The Courts have not yet set themselves to endeavour to reconcile this holding of the House of Lords with the old rules which obtain at least in England:—(1) That a right to light cannot be under s. 3 acquired for a term of years (*k*); (2) that a man cannot have an easement over his own land (*l*); and (3) that a lessee for years must prescribe in his lessor, and cannot prescribe in himself (*m*).

Persons
against
whom the
enjoyment
must be had.

It will have been seen above (p. 211) that as a general rule the enjoyment of an easement as against an owner of the servient tenement who is unable to dispose of the fee is not sufficient to give rise to a prescriptive title. The ordinary cause of such an inability arises from a deficiency of estate, as where a servient owner is tenant for life or tenant for years. The inability, however, to dispose of the fee may arise from other causes, e.g., where the owner of the servient tenement is restrained from alienation. In *Lemaître v. Davis* (*n*) a right of support was claimed under s. 2 of the Prescription Act. The fee simple in the servient tenement belonged to the rector and churchwardens of a parish—an ecclesiastical corporation—who were restrained from alienation. Hall, V.-C., held that the fact that the servient tenement was held by such a corporation did not prevent a title to the easement being acquired under the Act. If the claim there was based upon an enjoyment for the shorter period of twenty years mentioned in s. 2, the soundness of the decision seems doubtful. If, on the other hand, the claim were based upon an enjoyment for the longer period of forty years mentioned in the same section, and if the true view of the Act be that in such a case it is unnecessary to presume an absolute grant (*o*), the decision was right (*p*).

Again, the inability of the servient owner to dispose of the fee simple of the servient tenement may arise from the doctrine of

(*j*) *Morgan v. Fear*, 1907, A. C. 429; 76 L. J. Ch. 660. This decision seems to have been arrived at in deference to the following earlier authorities, viz.:—*Freewen v. Philipps*, 1861, 11 C. B. N. S. 449; 30 L. J. C. P. 356; 132 R. R. 616; *Mitchell v. Cantrill*, 1887, 37 Ch. D. 56; 57 L. J. Ch. 72; *Robson v. Edwards*, 1893, 2 Ch. 146; 62 L. J. Ch. 378. These authorities were discussed by the C. A. when *Fear v. Morgan* was before them, 1906, 2 Ch. 406.

(*k*) *Wheaton v. Maple*, 1893, 3 Ch. 65; 62 L. J. Ch. 963; approved by C. A. in *Fear v. Morgan*, 1906, 2 Ch. 418, 419, 423.

(*l*) *Metropolitan Co. v. Fowler*, 1892, 1 Q. B. 71; 62 L. J. Q. B. 553.

(*m*) *A.-G. v. Gauntlett*, 1829, 3 Y. & J. 99; 32 R. R. 743; *Gateway's Case*, 1607, 6 Rep. 60.

(*n*) 1881, 19 Ch. D. 281, 291; 51 L. J. Ch. 173.

(*o*) As to this, see post, p. 218.

(*p*) As to acquiring by prescription an easement over ecclesiastical property, a reference may be made to *Barker v. Richardson*, 1821, 4 B. & Ald. 582; 23 R. R. 400; *Ecclesiastical Commrs. v. Kino*, 1880, 14 Ch. D. 213; 49 L. J. Ch. 529.

Persons
against
whom the
enjoyment
must be had.

ultra vires. Thus, where the owner of the servient tenement is a company whose powers of disposition are limited, and a grant of the easement by such company would be *ultra vires*, it seems that no prescriptive title will arise either where an easement of any kind is claimed by prescription at common law or under the doctrine of lost grant, or where an easement other than light is claimed on the ground of a twenty years' enjoyment under s. 2 of the Prescription Act. The prescriptive title will not arise, because the necessary grant cannot be presumed (*q*).

If, however, a claim were made to the easement of light over land owned by the same company on the ground of twenty years' enjoyment under s. 3 of the Prescription Act, it is clear that it would not be necessary to presume a grant, and a right to the easement might be established (*r*).

Lastly, if an easement other than light were claimed under s. 2 of the Prescription Act on the ground of a forty years' enjoyment over land owned by the same company, the question whether a prescriptive title would arise is not free from doubt. Would it, or would it not, be necessary in this case to presume an absolute grant? The words which in s. 2 are applied to a forty years' enjoyment of an easement other than light are identical with the words which in s. 3 are applied to a twenty years' enjoyment of light. And it would seem that the same result which in the latter case was held to follow as regards light should also in the former case follow as regards easements other than light—viz., that it is not necessary to presume an absolute grant (*s*).

Again, the words of ss. 7 and 8 of the Prescription Act appear to have a material bearing on the question. If where an easement is claimed under s. 2 of the Act on the ground of a forty years' enjoyment it is necessary to presume an absolute grant, this alone would, where the servient tenement is owned by a tenant for life or for years, prevent a prescriptive title from arising, and the special

(*q*) *Rochdale Co. v. Radcliffe*, 1852, 18 Q. B. 287, 315; 21 L. J. Q. B. 297; 88 R. R. 587; *A.-G. v. G. N. R.*, 1909, 1 Ch. 775, 778; 78 L. J. Ch. 577. Compare *Nearns v. Peterborough Council*, 1902, 1 Ch. 557; 71 L. J. Ch. 378, and *Mill v. New Forest*, 1856, 18 C. B. 60; 25 L. J. C. P. 212; 107 R. R. 205, where a profit à prendre was enjoyed as against the Crown for thirty years, and a claim made under s. 1 of the Prescription Act was defeated on the ground that the Crown was by statute incapacitated from making a

grant. In some of the former editions of the present treatise it was suggested that there might be a distinction between those cases where there is simply no power to grant and those in which there is an absolute prohibition.

(*r*) *Tapling v. Jones*, 1865, 11 H. L. C. 304; 34 L. J. C. P. 342; 140 R. R. 192; *Jordeson v. Sutton*, 1898, 2 Ch. 614, 618, 626; 68 L. J. Ch. 457.

(*s*) See the words of Lord Selborne in *Dalton v. Angus*, 1881, 6 App. Cas. 800; 50 L. J. Q. B. 689.

provisions as to exclusion which in fact are contained in ss. 7 and 8 would seem inappropriate. In *Wright v. Williams* (t), which was decided under s. 8, a question arose as to the effect of a forty years' enjoyment of an easement other than light, the servient tenement being held by a tenant for life. The language used by the judges in that case seems to show that in their opinion it was not necessary in such a case to presume an absolute grant.

Persons against whom the enjoyment must be had.

On the other hand, in *Staffordshire Co. v. Birmingham Co.* (u), where an easement was claimed on the ground of a forty years' enjoyment, and it was objected that the servient tenement was owned by a company who had no power to make a grant, it was said in the House of Lords that, if the Prescription Act applied to the case, it would be necessary to show that the right claimed could have been granted, and it was said, further, that under the circumstances a grant would have been ultra vires and void.

B. By whom the enjoyment must be had.

Upon the question by whom the enjoyment must be had, Mr. Gale wrote as follows:—Although the user by which it is sought to acquire an easement must be that of the party in possession of the dominant tenement, yet any user under a claim of right in respect of such tenement will be in contemplation of law user by such possessor. Hence it appears that there is no disability of any kind to destroy the effect of such user. These words of Mr. Gale must now, however, be read subject to the following remarks.

Persons by whom the enjoyment must be had.

The special case where light is claimed under s. 3 of the Prescription Act should be considered in connection with such section and the decisions under it. Further, the case where an easement other than light is claimed on the ground of forty years' enjoyment under s. 2 of the Prescription Act should be considered in connection with the decisions referred to ante, pp. 215, 218. Subject as regards these two cases to the result of the above decisions some principles laid down as to the persons by whom the enjoyment of an easement must be had will be discussed in the remaining part of the present section.

According to the general rule requiring the presumption of an absolute grant which is applicable in the establishment of a prescriptive title to an easement (x), it is not only necessary to show that there was a capable grantor as regards the servient tenement, but it is also

(t) 1836, Tyr. & G. 375; 5 L. J. pp. 260, 262, 268 and 278; 35 L. J. Ch. (N. S.) Ex. 107; 46 R. R. 265. 257.

(u) 1886, L. R. 1 H. L. 254 (see (x) Ante, p. 211.

Persons by whom the enjoyment must be had.

necessary to show that there was a capable grantee as regards the dominant tenement. Thus it seems that a statutory company cannot by prescription acquire rights more extensive than are conferred upon it by the Legislature; and accordingly a company which has been reconstituted as a railway company could not by prescription acquire water rights (*y*). So, again, the "inhabitants" of a village cannot eo nomine acquire by prescription a right of way; "inhabitants" not being capable grantees (*z*).

Again, while a prescriptive easement must be claimed as appurtenant to the fee simple of the dominant tenement (*a*), it is sufficient in pleading to claim it on the ground of an enjoyment as of right by the occupiers of such tenement (*b*). And accordingly the enjoyment of an easement by a tenant for life in possession of the dominant tenement will enure for the benefit of the fee simple and be a sufficient foundation for presuming an absolute grant accordingly (*c*).

As regards the enjoyment of an easement by a tenant for years, the possession of the tenant is the possession of his landlord (*d*). And where Blackacre, the dominant tenement, is demised by A. to B., and B. enjoys an easement over the adjoining Whiteacre, B.'s enjoyment enures for the benefit of A.'s fee. But where Whiteacre also belongs to A. in fee, no easement is acquired by B.'s enjoyment (*e*).

Where a permanent artificial stream in Cornwall had been used from time immemorial by tin-bonders (who merely were entitled by custom to work tin on the dominant tenement), such user was sufficient to give water rights by immemorial prescription to the owner in fee of the dominant tenement; the presumption being that the privilege was originally acquired by arrangement with such owner as well as with the bonders (*f*).

(*y*) *National Manure Co. v. Donald*, 1859, 4 H. & N. 8; 28 L. J. Ex. 185; 118 R. R. 299. See *Traill v. McAllister*, 1890, 25 L. R. Ir. 524, where it was held that a prescriptive title to an easement cannot result from acts of the dominant owner which are prohibited by statute.

(*z*) *Fox v. Venables*, 1590, Cro. Eliz. 180. See the discussion of customary rights, ante, p. 4.

(*a*) *Wheaton v. Maple*, 1893, 3 Ch. 63; 62 L. J. Ch. 963; *Kilgour v. Gaddes*, 1904, 1 K. B. 466; 73 L. J. K. B. 233.

(*b*) Prescription Act, s. 5.

(*c*) As to the rules laid down before the Prescription Act, see *Grimstead v. Marlow*, 1792, 1 Wms. Saunds. 624; *A.-G. v. Gauntlett*, 1829, 3 Y. & J. 93;

32 R. R. 743; *Codling v. Johnson*, 1829, 9 B. & C. 933; 8 L. J. K. B. 68; 33 R. R. 375.

(*d*) *Gayford v. Moffatt*, 1868, 4 Ch. 135.

(*e*) *Ibid.*; *Daniel v. Anderson*, 1862, 31 L. J. Ch. 610; 126 R. R. 422. See *Sturges v. Bridgman*, 1870, 11 Ch. D. 855; 48 L. J. Ch. 785; *Bailey v. G. W. R.*, 1884, 26 Ch. D. 441; *Macnaghten v. Baird*, 1903, 2 I. R. 731. For the case where the tenant of the dominant tenement takes a lease of the servient tenement, see *Ladyman v. Grave*, 1871, 6 Ch. 763.

(*f*) *Ivimey v. Stocker*, 1886, 1 Ch. D. 396; 35 L. J. Ch. 467. Compare *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 353; 147 R. R. 739.

The civil law adverted to an extreme case of the only user of the easement being by a person not having the use of reason, in which case no right was acquired, the intention to assert a right not existing. This was illustrated by the instance of putting something into the hand of a man when asleep (*g*). According to the same law, user by an infant capable of understanding what he was doing was sufficient to acquire the servitude. So also was user by a tenant or servant, even without the owner's knowledge (*h*).

Persons by whom the enjoyment must be had.

SECT. 3.—*Qualities and Character of the necessary Enjoyment.*

In order that the enjoyment, which is the quasi-possession of an easement, may confer a right to it by length of time, it must have had certain qualities and been of a certain character (*i*). This character will be discussed in the present section.

Qualities of the necessary enjoyment.

In delivering the judgment of the Court of Exchequer in *Bright v. Walker*, in which a right of way was claimed under the Prescription Act and the qualities of an enjoyment necessary to clothe it with right by lapse of time were considered, Parke, B., made the following general remarks (*k*): "In order to establish a right of way, and to bring the case within this section (2nd), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which, by s. 5, such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the

(*g*) *Furius et pupillus sine tutoris auctoritate non potest incipere possidere; quia affectionem tenendi non habent, licet maxime corpore suo rem contingant; sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilius quidem et Nerva filius, etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt; eam enim rem facti, non juris esse: quæ sententia recipi potest, si ejus ætatis sint ut intellectum capiant.*—Dig. 41, 2, 1, s. 3, de adq. vel amit. poss.

(*h*) *Is ejus colonus, aut hospes, aut quis alius iter ad fundum fecit; usus videtur itinere, vel actu, vel viâ, et ideo interdictum habebit; etiam si ignoravit ejus fundus esset, per quem iret, retinere eum servitutem.*—Dig. 43, 19, 1, s. 7, de itinere.

(*i*) "The sort of possession that is required to establish a prescription is the same in the civil law, the law of Jersey, and our common law," per Lord Wynford in *Beust v. Pipon*, 1829, P. C. 1 Knapp, 70.

(*k*) 1 C. M. & R. 219.

Qualities of
the necessary
enjoyment.

easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised." The authority of this case, and the doctrines laid down by the Court in it, were fully recognized in *Monmouthshire v. Harford* (l) and *Tickle v. Brown* (m).

The effect of the enjoyment, wrote Mr. Gale, being to raise the presumption of a consent on the part of the owner of the servient tenement, it is obvious that no such inference of consent can be drawn, unless it be shown that he was aware of the user, and, being so, made no attempt to interfere with its exercise (n). Still less can such consent be implied, but rather the contrary, where he has contested the right to the user, or where, in consequence of such opposition, an interruption in the user has actually taken place. Even supposing these defects of the user not to exist, still the effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, however, is, that a party enjoying an easement acted under a claim of right until the contrary is shown (o).

The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be "nec vi, nec clam, nec precario" (p). And the law of England, as cited by Lord Coke, from Bracton, exactly agrees with the civil law. "Both to customs and prescriptions these two things are incidents inseparable, viz., possession, or usage, and time. Possession must have three qualities. It must be long, continual and peaceable—'longa, continua et pacifica.' For it is said: Transferuntur dominia sine titulo et traditione per usucaptionem, scilicet per longam, continuam et pacificam possessionem. Longa, i.e. per spatium temporis per legem definitum. Continuum dico, ita quod non sit legitime

(l) 1834, 1 C. M. & R. 614; 40 R. R. 648; 4 L. J. (N. S.) Ex. 43.

(m) 1836, 4 A. & E. 369; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358; *Winship v. Hudspeth*, 1852, 10 Ex. 5; 23 L. J. (N. S.) Ex. 268; 102 R. R.

441.

(n) See p. 232, *post*.

(o) *Campbell v. Wilson*, 1803, 3 East. 294; 7 R. R. 462.

(p) Cod. 3, 34, 1, de serv.; Dig. 8, 5, 10, si serv. vind.

interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. Ut si verus dominus, statim cum intrusor vel disseissor ingressus fuerit seisinam, nitatur tales viribus repellere et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen, cum defecerit, diligens sit ad impetrandum et prosequendum. Longus usus nec per vim, nec clam, nec precario, &c.” (q).

Qualities of the necessary enjoyment.

The words of Lord Coke have been repeated by modern judges in stating the present rule. Thus it was said by Willes, J.: “In the case of prescription, long enjoyment in order to establish a right must have been as of right, and therefore neither by violence, nor by stealth nor by leave asked from time to time” (r). “An enjoyment as of right,” said Lord Davey, “must be ‘nec vi, nec clam, nec precario’” (s). Lord Davey’s concise explanation must suffice for our present purpose; but reference may be made to the longer explanations given by Lord Denman in *Tickle v. Brown* (t), by Brett, L.J., in *De La Warr v. Miles* (u), and by Cozens-Hardy, J., in *Gardner v. Hodgson’s Co.* (x).

The words “as of right” occur in s. 5 of the Prescription Act; and the modern rules as to the necessity of proving an enjoyment of this character appear to be as follows:—Where light is claimed under s. 3 of the Act, it is not necessary that the enjoyment should have been as of right (y). But where an easement other than light is claimed under s. 2 of that Act, it is settled that the enjoyment on which the claim is based (whether for the period of twenty years or for that of forty years) must be shown to have been “as of right” (z). And in the case of claims by prescription at common law or under the doctrine of lost grant, whether to light or to any other kind of easement, it is also necessary to show an enjoyment as of right (a). Thus, in referring to the doctrine of lost grant, it was said by FitzGibbon, L.J.: “The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, as of right, of advantages which are primâ facie inexplicable in the absence of legal title. In cases

(q) Co. Litt. 113 b; Bracton, lib. 2, f. 51 b, 52 a, 222 b.

(r) *Mills v. Colchester*, 1867, L. R. 2 C. P. 486; 36 L. J. C. P. 210.

(s) *Gardner v. Hodgson’s Co.*, 1903, A. C. 238; 72 L. J. Ch. 558. Lord Davey was repeating the words used by Erle, J., in *Eaton v. Swansea*, 1851, 17 Q. B. 275; 20 L. J. Q. B. 482; 85 R. R. 455.

(t) 1836, 4 A. & E. 369; 5 L. J.

(N. S.) K. B. 119; 43 R. R. 358.

(u) 1881, 17 Ch. D. 591; 50 L. J. Ch. 754.

(x) 1900, 1 Ch. 597; 70 L. J. Ch. 504.

(y) *Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 484.

(z) *Kilgour v. Gaddes*, 1904, 1 K. B. 462; 73 L. J. K. B. 233.

(a) See the above words of Willes, J., in *Mills v. Colchester*, ubi sup.

Qualities of
the necessary
enjoyment.

such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been 'as of right.' It appears to me, in the present case, that the evidence is inconsistent with right, and that the user is consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner. Such a user never could have been 'as of right' in its inception; it could never acquire during its continuance any higher than a permissive character, and it therefore never could be, or become, a foundation for the presumption of a grant" (b).

Accordingly the following rules may be laid down as applying to the acquisition by prescription of easements generally; though not (except where otherwise stated) to the acquisition of the right to light under s. 3 of the Prescription Act.

Nec vi.

(I.) The enjoyment must not be by violence.

At common law any acts of interruption or opposition from which a jury might infer that the enjoyment was not rightful, were sufficient to defeat the effect of the enjoyment, the question being whether, under all the facts of the case, such enjoyment had been had under a concession of right. By the fourth section of the Prescription Act it is enacted that nothing shall be deemed to be an interruption, unless it shall be submitted to or acquiesced in for the space of a year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same. It is certainly by no means clear what the precise intention of the Legislature was; but it appears hardly possible that it should have been intended to confer a right by user during the prescribed period, however "contentious" or "litigious" such user may have been.

In *Eaton v. Swansea Co.* (c) the question was raised what would be the effect in law of a state of "perpetual warfare" between the dominant and servient owners? And it was held by the Court of Queen's Bench that interruptions acquiesced in for less than a year might show that the enjoyment never was of right. The inference drawn from this decision by Bowen, J., was that the user

(b) *Hanna v. Pollock*, 1900, 2 I. R. 339.
671; see per Buckley, J., *A.-G. v. Horner*, 1913, 2 Ch. 178; 82 L. J. Ch.

(c) 1851, 17 Q. B. 267; 20 L. J. Q. B. 482; 85 R. R. 455.

ought to be neither violent nor contentious. The neighbour without actual interruption of the user ought perhaps on principle to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised (*d*). Where the servient owner had obstructed light as often as he pleased, though no act of obstruction had lasted for a whole year, and a right to light was claimed under the Act, it was held by Wood, V.-C., that the dominant owner had failed in establishing his right (*e*).

Qualities of the necessary enjoyment.
Nec vi.

An act of partial interruption, instead of destroying the easement claimed, may qualify it, and be evidence of another easement. Thus, where a weir across a river was claimed by prescription, and a miller, whose mill was on its banks, had caused a fender to be shut down, the Court held this not fatal to the claimant's right, thinking that there was nothing to prevent a second easement being acquired, as subordinate to that already existing, if the subject-matter admitted of it (*f*).

By the civil law any enjoyment was said to be forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement (*g*).

(II.) The enjoyment must not be secret.

Nec clam.

The user of an easement may be secret, either by reason of the mode in which a party enjoys it, or by reason of the nature of the easement itself.

Instances of the former kind are where the right is exercised by stealth, or in the night (*h*). Instances of the latter kind occur

(*d*) *Dalton v. Angus*, 1881, 6 App. Cas. 786; 50 L. J. Q. B. 689. See *Lyell v. Hothfield*, 1914, 3 K. B. 916.

(*e*) *Brook v. Archer*, 1868, W. N. 5. See also *Bailey v. Appleyard*, 1838, 8 A. & E. 161; 7 L. J. (N. S.) Q. B. 145; 47 R. R. 537; *Wright v. Williams*, 1836, 1 M. & W. 100; 3 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Glover v. Coleman*, 1874, L. R. 10 C. P. 108; 44 L. J. C. P. 66.

(*f*) *Rolle v. Whyte*, 1868, L. R. 3 Q. B. 302; 37 L. J. Q. B. 105; for a like decision, see *Goodman v. Saltash*, 1882, 7 App. Cas. 633; 52 L. J. Q. B. 193.

(*g*) Vi factum videri, Quintus Mucius scripsit, si quis contra quam prohibetur, fecerit: et mihi videtur plena esse Quinti Mucii definitio. Sed et si quis jactu vel minimi lapilli prohibitus facere, perseveravit facere: hunc quoque vi fecisse videri, Pædinus et Pomponius scribunt, eoque jure utimur.

—Dig. 43. 24. 1, s. 5, 6, quod vi aut clam.

Prohibitus autem intelligitur, quolibet prohibentis actu: id est vel dicentis se prohibere, vel manum opponentis, lapillumve jactantis prohibendi gratiâ. —Ibid. par. 20, s. 1.

(*h*) Itaque clam nascitur possessio, qui futuram controversiam metuens, ignorante eo, quem metuit, furtive in possessionem ingreditur. —Dig. 41. 2. 6, de adq. vel. amit. poss.

Talis usus non valet, cum sit clandestinus, et idem erit si nocturnus. —Bracton, lib. 2, f. 52 b.

Aut in absentia domini.—Ibid. Lib. 4, f. 221 a.

See *Danson v. Norfolk*, 1815, 1 Price, 246; 16 R. R. 708; and, as to the case of a bailiff claiming a right by user over his master's property, *Officers of State v. Haddington*, 5 Wils. & Shaw, Sc. App. 570.

Qualities of
the necessary
enjoyment.
Nec clam.

where a man who secretly excavates his own land on which a house is standing, subsequently and in consequence of the excavation claims an extraordinary degree of support for the house from the neighbouring soil (i), or where extraordinary support is claimed in consequence of a peculiarity in the internal structure of the house (k), not visible to the neighbour.

A consideration of this rule would, it appears, afford an answer in the affirmative to the question incidentally raised in *Dodd v. Holme* (l)—whether, in order to acquire a right to support for a house by antiquity of possession, it must originally have been built with that degree of strength and coherence which may reasonably be expected to be found in a well-built house. For as there might be nothing in the external appearance of the house to give notice to the owner of the adjoining land that the weakness with which it was built caused it to require a greater degree of support from his soil than a well-built house would have required, and as quoad such additional support the enjoyment would have been secret, no presumption of a grant of it on his part could be implied. The same reasoning would also apply to the case of an ancient house, originally well built, becoming weaker from the want of proper repair. A man believing there were no minerals on his own land might be willing to subject it to the easement of support to a well-built house, which would diminish the value of his property only in the event of his wishing to mine in it, although he would refuse to restrict himself from digging a foundation for any building he might require; which would possibly be the case were he bound to afford the support necessary to sustain a rickety and ill-built edifice. There is also the case of a house originally requiring no more than an ordinary degree of support, but subsequently altered so as to require an unusual amount of lateral pressure to support it. But here, it seems that, if the alteration be openly and honestly made, the servient owner is fixed with notice that an additional burden of some kind is being imposed upon his tenement, and, if he makes no inquiry, will in time become subject to the

(i) *Partridge v. Scott*, 1838, 3 M. & W. 229; 7 L. J. (N. S.) Ex. 101; 49 R. R. 578.

(k) *Angus v. Dalton*, 1878, 4 Q. B. D. 162; see per Thesiger, L.J., 181-3, and per Cotton, L.J., 187; 48 L. J. Q. B. 225. The defendants elected not to take a new trial, so that the decision on this point of the Court of Appeal was not, strictly speaking, open to

review by the House of Lords; but the point was referred to on the appeal: see 6 App. Cas. 751 (Pollock, B.), 757 and 760 (Field, J.), 766 and 767 (Lindley, L.J.), 777 and 779 (Fry, J.), 787 and 789 (Bowen, J.), 801 (Lord Selborne, C.), 807 (Lord Penzance), 827 and 828 (Lord Blackburn).

(l) 1834, 1 A. & E. 493; 40 R. R. 344.

obligation of increased support (*m*). This reasoning also applies to the claim of an extraordinary degree of support from adjoining houses (*n*).

Qualities of the necessary enjoyment.
Nec clam.

Secrecy of enjoyment was one of the difficulties in establishing the easement of support which was dealt with in the leading case of *Dalton v. Angus* (*o*). It was established by that decision that there must be some knowledge or means of knowledge on the part of the servient owner against whom the right is claimed (*p*). And in the simple case where a prescriptive easement of support is claimed by the owner of one of two adjoining houses against the owner of the other, it must be shown that the owner of the servient tenement knew or had the means of knowing that his house was affording support to the other (*q*). Again, where the sides of a wooden dock had for more than twenty years been supported by underground rods which were not themselves visible, but certain nuts which fastened them were visible, a claim to support for the dock from the rods was defeated on the ground that the enjoyment had been clam. It was held in that case by Romer and Stirling, L.JJ., that on the facts knowledge of the rods ought not to be attributed to the servient owner; Vaughan Williams, L.J., who dissented, holding, on the other hand, that there was sufficient means of knowledge (*r*).

In connection with the rule that enjoyment as of right must not be clam, reference should be made to the cases quoted later (p. 231) laying down that the user on which a claim to a prescriptive easement is based must be a user of which the servient owner has knowledge either actual or constructive.

By the civil law it was sufficient to vitiate the user, if, from the acts of the party, an intention of concealment could be inferred (*s*). This intention might be deduced from the manner in which the act

(*m*) *Dalton v. Angus*, 1881, 6 App. Cas. 740; per Lord Selborne, at p. 801; 50 L. J. Q. B. 689.

(*n*) See per Bramwell, B., in *Solomon v. Vintners' Co.*, 1859, 4 H. & N. 601; 28 L. J. Ex. 370; 118 R. R. 629, acc. In *Angus v. Dalton*, Cockburn, C.J., appears to have considered that the very possibility of acquiring any prescriptive right to support was excluded by the secrecy of the enjoyment (3 Q. B. D. 117); but this opinion was negatived by the Court of Appeal and the House of Lords.

(*o*) 1881, 6 App. Cas. 740; 50 L. J.

Q. B. 689.

(*p*) *Union Co. v. London Dock Co.*, 1902, 2 Ch. 574; 71 L. J. Ch. 791.

(*q*) *Gately v. Martin*, 1900, 2 L. R. 269. See *Lemaître v. Davis*, 1881, 19 Ch. D. 291; 51 L. J. Ch. 173.

(*r*) *Union Co. v. London Dock Co.*, *ubi sup.*

(*s*) Idem Aristo putat, cum quoque clam facere, qui celandi animo habet eum, quem prohibitorium se intellexerit, et id existimat, aut existimare debet, se prohibitum iri.—Dig. 43, 24, 3, § 8, quod vi aut clam.

Qualities of the necessary enjoyment.

Nec clam.

Nec precario.

was done, and the Digest contains a variety of instances in which such an intention was inferred from the facts (*t*).

(III.) The enjoyment must not be permissive. It must not be precario.

What is precarious? "That which depends not on right, but on the will of another person" (*u*). "Si autem," says Bracton, "(seisina) precaria fuerit et de gratiâ, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus" (*x*).

Enjoyment had under a licence or permission from the owner of the servient tenement confers no right to the easement. Each renewal of the licence rebuts the presumption which would otherwise arise, that such enjoyment was had under a claim of right to the easement (*y*).

Before the Prescription Act, any admission, whether verbal or otherwise, that the enjoyment had been had by permission of the owner of the servient tenement was sufficient to prevent the acquisition of the right, however long such enjoyment might have continued.

Since the Prescription Act, where an easement is claimed under the Act, the effect of permission for the enjoyment having been given by the owner of the servient tenement has been considered in many cases.

An easement other than light may be claimed under s. 2 of the Act on the ground of an enjoyment for twenty years; and in that case it has been laid down that a parol permission, if it extends over the whole period of twenty years, is consistent with, and will not per se prevent the enjoyment from being, an enjoyment as of right (*z*). On the other hand, if the parol permission be given from

(*t*) Dig. 43, 24, 3, §§ 7, 8, quod vi aut clam.

(*u*) Per Farwell, J., *Burrows v. Lang*, 1901, 2 Ch. 510; 70 L. J. Ch. 607.

(*x*) Lib. 4, f. 221 a.

(*y*) *Monmouthshire v. Harford*, 1834, 1 C. M. & R. 614; 4 L. J. (N. S.) Ex. 43; 40 R. R. 648; *Tone v. Preston*, 1883, 24 Ch. D. 739; 53 L. J. Ch. 50; *Chamber Co. v. Hopwood*, 1886, 32 Ch. D. 549; 55 L. J. Ch. 859.

If the enjoyment commenced by permission, it is a question for the jury whether it did not continue by permission (*Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 353; 147 R. R. 739). The fact that a gate, through

which a right of way was claimed, had always been kept locked, the key having been kept by the proprietor of the servient tenement, but always having been asked for by the proprietor of the dominant tenement as a matter of right, when it was required, and never having been refused, did not prevent the acquisition, by prescription, of the easement (*Roberts v. Fellowes*, 1906, 94 L. T. 279).

(*z*) *Kinloch v. Nevile*, 1840, 6 M. & W. 806. See *Tickle v. Brown*, 1836, 4 A. & E. 383; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358, where it is said that such a parol permission must be pleaded specially. Qu. as to its effect, if pleaded.

time to time within the twenty years, this would prevent the enjoyment from being an enjoyment as of right (*a*).

Qualities of the necessary enjoyment.
See *precario*.

Again, an easement other than light may be claimed under s. 2 of the Act on the ground of an enjoyment for forty years; and in that case it has been laid down that a written permission, if it extends over the whole period of forty years, is consistent with, and will not per se prevent the enjoyment from being technically, an "enjoyment as of right" (*b*); though under the concluding words of s. 2 the written permission, if properly pleaded, may prevent the acquisition of an easement (*c*). On the other hand, if the permission be given from time to time within the forty years, this would prevent the enjoyment from being as of right and would defeat the claim to an easement (*d*). As regards a parol permission extending over the whole period of forty years, it has been held that this is of no moment in preventing the acquisition of an easement (*e*).

Where the easement of light is claimed under s. 3 of the Act, it has been laid down in the House of Lords that enjoyment as of right need not be alleged or proved and that the right is acquired by twenty years' enjoyment without interruption and without written consent (*f*). A written consent would negative the effect of the enjoyment (see s. 3), but not a verbal consent (*g*).

The rule that an enjoyment which is by permission is not an enjoyment as of right is illustrated by cases as to water rights. Thus, as regards the artificial watercourse which was dealt with in the leading case of *Wood v. Waud* (*h*), it has been said that in that case the nature of the watercourse showed that though the water in fact had flowed for sixty years, yet from the beginning it was only intended to flow so long as the coalowners did not think

(*a*) *Ibid.*; *Monmouthshire v. Harford*, 1834, 1 C. M. & R. 630, 631.

(*b*) *Tickle v. Brown*, 1836, 4 A. & E. 383; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358: e.g., such a written permission could not be proved under a general traverse of enjoyment as of right (*ib.*).

(*c*) *Ibid.*; see *Gardner v. Hodgson's Co.*, the judgment of Cozens-Hardy, J., 1900, 1 Ch. 594; 70 L. J. Ch. 504; and the dissenting judgment of Rigby, L.J., in the C. A., 1901, 2 Ch. 213; 70 L. J. Ch. 504; *Loury v. Crothers*, 1872, 1 R. 5 C. L. 98.

(*d*) *Tickle v. Brown*, *ubi sup.*; *Beasley v. Clarke*, 1836, 2 Bing. N. C. 705; 5 L. J. (N. S.) C. P. 281; 42 R. R.

704; *Gardner v. Hodgson's Co.*, 1903, A. C. 229, affirming C. A., 1901, 2 Ch. 198; 72 L. J. Ch. 558.

(*e*) *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 600; 70 L. J. Ch. 504. See *De La Warr v. Miles*, 1881, 17 Ch. D. 596; 50 L. J. Ch. 754.

(*f*) *Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 484.

(*g*) *London v. Procters' Co.*, 1842, 2 Mood. & R. 409; 62 R. R. 846; *Judge v. Lowe*, 1873, 1 R. 7 C. L. 291; see *Plasterers' Co. v. Parish Clerks' Co.*, 1851, 6 Ex. 630; 20 L. J. Ex. 362; 86 R. R. 413.

(*h*) 1849, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809.

Qualities of
the necessary
enjoyment.
Nec precario.

fit otherwise to drain their mines, and so was precarious (*i*). It was said also that the decision of the Court of Exchequer in the last-mentioned case was in fact a decision that an enjoyment for more than a statutable period is not an enjoyment as of right if during the period it is known that it is only permitted as long as some particular purpose is served (*k*).

The "precarious enjoyment" of the civil law, by which, as has been already seen, no prescriptive right could be acquired, is identical with the permissive enjoyment of the English law (*l*).

(IV.) As to enjoyment under a mistake.

The authorities as to the enjoyment under a mistake of a right claimed as an easement are not consistent. Where enjoyment takes place under a mistaken view of their rights entertained by both the dominant and servient owners, it seems that there is no enjoyment "as of right" upon which a prescriptive easement can be claimed. Thus, where Blackacre was demised to a tenant who during the lease made and enjoyed a watercourse on Blackacre for the benefit of an adjoining property of his own; the enjoyment of the watercourse being of a kind which the Court assumed was not authorized by the lease, but both landlord and tenant being under the mistaken belief that it was so authorized; the Court of Appeal held that there was no enjoyment as of right (*m*). Similarly it has been laid down that enjoyment must be attributed to the right claimed by the dominant owner and to no other. And if the enjoyment originated in mistake and the dominant owner asserted his right to be grounded on some document which did not support it, then, however adversely the right may have been exercised, it cannot for the purposes of presumption be referred to any other ground than that which the dominant owner insisted on at the time (*n*). On the other hand, a different view seems to have been taken by the Court in some decisions as to profits à prendre. Thus, where A., owning a tenement, claimed as appurtenant thereto the right to cut litter in a forest on the ground of more than sixty years'

(*i*) See *Mason v. Shrewsbury*, 1871, L. R. 6 Q. B. 584; 40 L. J. Q. B. 293.

(*k*) Ibid.; see *Staffordshire Co. v. Birmingham Co.*, 1866, L. R. 1 H. L. 254; 35 L. J. Ch. 257.

(*l*) *Precarium est, quod precibus potenti utendum conceditur (tamdiu) quamdiu is, qui concessit, patitur.*—Dig. 43, 26, 1, de precario.

Veluti si me precario rogaveris, ut per fundum meum ire, vel agere tibi liceat:

vel ut in tectum vel in aream aedium mearum stillicidium vel tignum in parietem immissum habeas.—Ibid. L. 3.

(*m*) *Chamber Co. v. Hopwood*, 1886, 32 Ch. D. 559; 55 L. J. Ch. 859.

(*n*) *A.-G. v. Horner*, 1913, 2 Ch. 169, 179; 82 L. J. Ch. 339, referring to *Campbell v. Wilson*, 1803, 3 East, 301; 7 R. R. 462; *Rivers v. Adams*, 1878, 3 Ex. D. 371; 48 L. J. Ex. 47.

enjoyment, the Court of Appeal held that there had been enjoyment as of right, although A. had claimed to do the acts of enjoyment under the mistaken supposition that they were justified by an old decree which in the Court's view did not confer the right (*o*). The nature of the claim made by the dominant owner when doing the acts of enjoyment was said to be immaterial (*p*).

Qualities of the necessary enjoyment.

(V.) The enjoyment must be one of which the servient owner has knowledge either actual or constructive.

This rule will be best illustrated in the first instance by the following statements of law made by modern judges in cases where easements were called in question.

In *Sturges v. Bridgman* (*q*) Thesiger, L.J., in delivering the judgment of the Court of Appeal, used the following words: "The law governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Again, in delivering his opinion to the House of Lords in *Dalton v. Angus* (*r*), Fry, J., said: "In my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then

(*o*) *De La Warr v. Miles*, 1881, 17 Ch. D. 535; 50 L. J. Ch. 754; followed in the Irish case of *Dawson v. McGroggan*, 1903, 1 I. R. 92 (where a landlord and tenant were both under a mistaken belief as to the effect of a lease), but distinguished in *Lyell v. Hothfield*, 1914, 3 K. B. 917.

(*p*) 17 Ch. D. 585, 594, 597; 50

L. J. Ch. 754.

(*q*) 1879, 11 Ch. D. 863; 48 L. J. Ch. 785. See also per Stirling, L.J., *Roberts v. James*, 1903, 89 L. T. 287; and per Bray, J., *Ambler v. Gordon*, 1905, 1 K. B. 424; 74 L. J. K. B. 185.

(*r*) 1881, 6 App. Cas. 773; 50 L. J. Q. B. 737.

Qualities of
the necessary
enjoyment.

of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve—1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.”

Referring to the above opinion of Fry, J., Lord Penzance, in his speech in the House of Lords in *Dalton v. Angus*, stated that he was “in entire accord” with that judge; the opinion being also described by Lord Blackburn as “a very able one” (*s*). Lord Blackburn’s own view seems to have been to base prescription not so much upon acquiescence as upon utility, “bono publico” (*t*). But recent decisions appear to have followed rather the lines laid down by Fry, J., than those laid down by Lord Blackburn. In *Union Co. v. London Dock Co.* (*u*) Vaughan Williams, J., distinctly prefers the view of Fry, J., stating, however, at the same time that actual knowledge is not essential to acquiescence, but that means of knowledge is sufficient (*u*).

The cases in which the importance of knowledge on the part of the servient owner has been most frequently discussed are those where the servient tenement has during the enjoyment been in the possession of a tenant for life or years. And referring to these cases Mr. Gale wrote: The want of acquiescence of the owner of the inheritance of the neighbouring tenement may, it would seem, be inferred, either from the circumstance that he is not in possession, or from the

(*s*) 1881, 6 App. Cas. 803, 823; 50 L. J. Q. B. 689.

(*t*) 1881, 6 App. Cas. pp. 818, 826.

(*u*) 1902, 2 Ch. 568, 569; 71 L. J. Ch. 791.

nature of the enjoyment of the right, it being, in truth and in fact, out of the view and knowledge of such neighbouring owner, though he be in possession. With respect to the former question an important point arises, whether, if the knowledge in fact of the owner of the inheritance of the hostile enjoyment of an easement be shown, he is bound by it. Cases decided before the Prescription Act certainly lay down, that if knowledge in fact of the reversioner be shown, he would be bound; but in one of the cases a learned judge (*x*) took a distinction between two divisions of easements, expressing an opinion to the effect, that an enjoyment of a negative easement would not bind the reversioner, unless his knowledge were positively shown, though it would be otherwise of an affirmative easement. If it be taken as law, that a reversioner can be bound by his knowledge in fact of a user enjoyed during the time his land is in the possession of a tenant, as his acquiescence in such cases is inferred from his offering no opposition, it would seem that he must, by law, have some valid mode of preventing the right from vesting by the continuance of the user. With respect to a negative easement it is clear the user gives no right of action to any person; and even as to some positive easements, such as a right of way, it is doubtful whether the reversioner could maintain an action (*y*); and during the continuance of the tenancy he may be unable either to interrupt the enjoyment or to compel his tenant to do so. Unless, therefore, some positive act, as a notice, intimating his dissent, be sufficient to obviate the effect of the user giving a right, he would not be brought into the condition of a "valens agere," without which the prescription ought not to run against him.

Qualities of
the necessary
enjoyment.

Bracton, treating of the qualities of a possession necessary to confer a right, appears to consider that such notices, at all events if followed up by an action as soon as the party is in a condition to bring one, will amount to an interruption. "Continuam dico ita quod non sit interrupta; interrumpi enim poterit multis modis sine violentiâ adhibitâ, per denuntiationem et impetrationem diligentem, et diligentem prosecutionem, et per talem interruptionem, nunquam acquirit possidens ex tempore liberum teneamentum" (*z*). And in speaking of this precise case—of a particular estate existing in the servient tenement during the user of the easement—he seems to be clearly of opinion that such a prohibition will

(*x*) Per Le Blanc, J., in *Daniel v. North*, 1809, 11 East, 372; and semble also by Parke, J., in *Gray v. Bond*, 1821, 2 Brod. & Bing. 667; 23 R. R. 530—534.

(*y*) As to the power of the reversioner to sue see Part VI., Chap. 2, sect. 2, post.

(*z*) Lib. 2, f. 51 b.

Qualities of
the necessary
enjoyment.

be sufficient to preserve his right. " Si autem fuerit seisinâ clandestina, scilicet in absentia dominorum vel illis ignorantibus, et si scirent essent prohibitori, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet " (a).

In *Daniel v. North* (b), which was an action before the Prescription Act for obstructing ancient lights, the premises on which the obstruction was erected had been occupied, during twenty years, by a tenant at will, and there was no evidence that the owner of those premises was aware of such enjoyment. Lord Ellenborough observed, on the argument for a new trial: " How can such a presumption be raised against the landlord, without showing that he knew of the fact when he was not in possession, and received no immediate injury from it at the time ? " In delivering his judgment his Lordship said: " The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against a party capable of making the grant: and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him; and it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by a tenant, though for twenty years, without the knowledge of the landlord, will bind the latter, and there is no evidence stated in the report from whence his knowledge should be presumed " (c).

As regards claims under the Prescription Act, Mr. Gale wrote that the Act had introduced two questions of difficulty upon the point how far the reversioner is bound by an enjoyment had during the continuance of a particular estate: 1st. Supposing the reversioner, being aware of the fact, from time to time gives a parol or written notice of his dissent to the enjoyment of the easement, any active interference on his part being prevented by the existence of the particular estate; or 2nd. Supposing the reversioner to be in total ignorance of any such enjoyment having been had during the continuance of the particular estate, and in consequence of such ignorance not to have availed himself of the exception in his favour contained in the statute—in either of these cases would a valid right to an easement be acquired?

In the case of light the answer to this question is in the affirmative (d).

(a) Lib. 4, f. 221.

(b) 1809, 11 East, 372.

(c) For the present rule where light is claimed under the statute, see ante, p. 199.

(d) See the cases cited ante, p. 199. In particular, see *Morgan v. Fear*, 1907, A. C. 425; 76 L. J. Ch. 668, where *Frewen v. Philipps*, 1861, 11 C. B. N. S. 449; 30 L. J. C. P. 356;

In the case of other easements it would appear to depend upon whether the user is of twenty years or forty years, and, if of twenty years, whether the reversioner is entitled expectant on a term of years, or on a life tenancy. If the user is of twenty years the reversioner expectant on a life tenancy would not be bound, by reason of the exclusion of the period of disability under s. 7 (e). As, however, s. 7 does not exclude the period during which the servient tenement shall have been in lease for a term of years, and s. 8 applies only to the period of forty years, it would seem that, so far as the statute is concerned, he would be bound, if his reversion was expectant on a term of years. If the user is of forty years, he would be bound, unless he resisted within three years from the expiration of the term, under s. 8 : or unless the circumstances were such (as, e.g., in *Kilgour v. Gaddes* (f)) as not to admit of the user having been " as of right " against him.

Qualities of the necessary enjoyment.

At all events, if the user of any easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of such tenancy having continued during a period of twenty years will not, it seems, be sufficient to defeat the right acquired by the lapse of time, unless it be also shown that the landlord, up to the time of granting the lease, was in ignorance that any such right was claimed. Thus, where a house was proved to have been built thirty-eight years, during the whole of which time there had been windows towards the adjoining premises, and these premises had belonged for a number of years to a family residing at a distance, none of whom were proved to have ever seen them, and they had been occupied by the same tenant during the last twenty years—the Court held that, after such a long enjoyment, the windows must be considered ancient windows, and that the plaintiff was consequently entitled to recover for their obstruction (g). Bayley, J., in his judgment, says : " The right is proved to have existed for thirty-eight years ; the commencement of it is not shown. It is possible that the premises both of the plaintiff and defendant once

132 R. R. 616, was approved. In his judgment in the last-mentioned case Pollock, C.B., used the following words : " It is true that if a man opens a light towards the adjoining land, and the landlord or reversioner of that land objects to it, it may be that the latter has no means of redress or power of preventing the right to light being acquired by twenty years' enjoyment, unless he can induce his tenant to take steps and block it up, or get an acknowledgment in writing that the right is

enjoyed by consent only."

(e) The life tenancy being *absolutely excluded* by s. 7 in computing the period of twenty years, the knowledge or acquiescence should seem to be immaterial.

(f) 1904, 1 K. B. 457 ; 73 L. J. K. B. 233.

(g) *Cross v. Lewis*, 1824, 2 B. & C. 686 ; 4 D. & R. 234 ; 2 L. J. K. B. 136 ; and see now *Morgan v. Fear*, 1907, A. C. 425 ; 76 L. J. Ch. 660.

Qualities of
the necessary
enjoyment.

belonged to the same person, and that he conferred on the plaintiff, and those under whom she claims, a right to have the windows free from obstruction. *Daniel v. North* has been relied on to show that the tenancy rebutted the presumption of a grant, but this is a very different case. Here tenancy was shown to have existed for twenty years, but the origin of the plaintiff's right was not traced." And Littledale, J., adds: "It was proved that the windows had existed for thirty-eight years, and the tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant" (*h*).

As the claim of an easement is in derogation of the ordinary rights of property, it lies upon the party asserting such claim, in opposition to common right, in all cases to support his case by evidence. In *Cross v. Lewis* the absence of any evidence as to the earlier state of the windows was indeed held to operate in favour of the plaintiff—the party claiming the easement; but the substantial proof, viz., of the user for a period of twenty years, had already been given by the claimant: and this, unrebutted by any evidence to take the case out of the ordinary rule, was of course sufficient to establish the easement. From the observations of the learned judge in the last mentioned case, it would appear that, provided the existence of the easement prior to the commencement of the tenancy was shown, and a sufficient length of enjoyment had taken place to afford evidence of a grant, the burden of proof would be thrown upon the owner of the land sought to be made liable to the easement; and unless he could show such previous user to have taken place without his knowledge, the right to the easement would be established (*i*). Indeed, it should seem from this case that proof of enjoyment for twenty years was in all cases *primâ facie* evidence of a title which must be rebutted by the owner of the servient tenement.

Where the servient tenement has been in the possession of a tenant for years, but an easement over it has been enjoyed for a long time, it has been laid down that the landlord may be presumed to have been aware of it (*k*).

(VI.) The enjoyment must be one which the servient owner could have prevented or interrupted.

This rule is well illustrated by the case of *Sturges v. Bridgman* (*l*).

(*h*) See *Palk v. Shinner*, ante, p. 204. P. 570; 48 R. R. 820; *Simpson v. A.-G.*, 1904, A. C. 507; 74 L. J. Ch. 1.
(*i*) See *Gray v. Bond*, 1821, 2 Brod. & Bing. 667; 23 R. R. 530—534. (*l*) 1879, 11 Ch. D. 852.
(*k*) *Davies v. Stephens*, 1836, 7 C. &

There the question arose as regards two adjoining houses in London. One of these belonged to confectioners, who for more than sixty years before action had caused noise on their premises by the use of a pestle and mortar in their kitchen. The other house was purchased a few years before action by a doctor, who thereupon built a consulting room close to the kitchen. Shortly afterwards he brought an action against the confectioners to restrain them from causing the noise, which, on the evidence, the Court held, amounted to a nuisance to the plaintiff's premises after the erection of his consulting room, but not before. The confectioners contended by way of defence that a right to cause the noise had been acquired by user, and that a grant should be presumed. The Court, however, decided against the contention; holding that, before the erection of the consulting room, the noise could not have been legally prevented, either physically or by means of an action, and that accordingly there was no sufficient user from which a grant could be presumed. The same doctrine was applied where claims were made to the access of air to chimneys over an unlimited surface of the servient tenement (*m*), and to subterranean water percolating in unknown channels (*n*). In neither of these cases could the servient owner have prevented the user.

Qualities of the necessary enjoyment.

In *Angus v. Dalton* (*o*) Cockburn, C.J., and Mellor, J., gave judgment against a claim of lateral support for buildings, partly upon the ground that the enjoyment of such support cannot be resisted or prevented by the adjoining owner by any means short of an excavation which may be destructive of his own tenement (*p*). But the majority of the Court of Appeal, while conceding that an enjoyment physically incapable of interruption would confer no right (*q*), held that the decided cases precluded them from applying the principle to the easement in question (*r*); and their decision was upheld by the House of Lords. "The power of resistance," said Lord Selborne (*s*), "does and must

(*m*) *Bryant v. Lefever*, 1879, 4 C. P. D. 173; 48 L. J. C. P. 380.

(*n*) *Chasemore v. Richards*, 1859, 7 H. L. C. 349; 28 L. J. Ex. 81; 115 R. R. 187.

(*o*) 1877—81, 3 Q. B. D. 85; 47 L. J. Q. B. 163; 4 Q. B. D. 162; 48 L. J. Q. B. 225; 6 App. Cas. 740; 50 L. J. Q. B. 737.

(*p*) 3 Q. B. D. at pp. 117, 125 ff.; 47 L. J. Q. B. 163.

(*q*) 4 Q. B. D. 175; 48 L. J. Q. B. 225.

(*r*) 4 Q. B. D. pp. 176 to 181.

(*s*) 6 App. Cas. 796; 50 L. J. Q. B. 737. Some of the judges even hinted that the enjoyment of lateral support was capable of being resisted by the simple method of bringing an action for trespass; and Lord Selborne appears to have concurred in this view, without making it the basis of his judgment. See per Lindley and Bowen, JJ., at pp. 763, 784, and the contrary opinion of Fry, J., at p. 775; Lord Selborne's opinion on this point is reported on p. 793, and Lord Watson's on p. 831.

Qualities of
the necessary
enjoyment.

in all such cases exist, otherwise no question like the present could arise. It is true that in some cases (of which the present is an example) a man acting with reasonable regard to his own interest, would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But on the other hand, it would not be reasonably consistent with the policy of the law in favour of possessory titles, that they should depend in each particular case upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience) when a man wishes, and finds it for his interest, to make such a use of his own land as will have that effect. So long as it does not suit his purpose and his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbour's diligence, industry, and expenditure." Lord Penzance concurred in the judgment, feeling himself bound by previous decisions; but his own opinion was that the enjoyment must, in order to confer a right, be capable of interruption "without extravagant and unreasonable loss or expense" (t).

The question what interruption will be sufficient to defeat a claim under the Act to an easement is dealt with in the cases quoted under s. 4 of the Act, ante, p. 201.

(VII.) The enjoyment must have been an enjoyment of the easement in the character of an easement distinct from the enjoyment of the land itself.

This rule has been so laid down as regards a right of way (u), and also as regards the right of light (x); and bears upon the case of unity of possession (xx). For where there is unity of possession of the dominant and servient tenements there is no enjoyment of an easement as an easement. The case of unity may also be referred to the preceding rule about prevention of enjoyment. Thus,

(t) 6 App. Cas. at p. 805; 50 L. J. Q. B. 689. The opinions of the judges on this point will be found reported on pp. 749 (Pollock, B.), 764 (Lindley, J.), 774 (Fry, J.), and 785 (Bowen, J.).

(u) *Battishill v. Reed*, 1856, 18 C. B.

702; 25 L. J. C. P. 291; 107 R. R. 465.

(x) *Harbridge v. Warwick*, 1849, 3 Ex. 552; 18 L. J. Ex. 245; 77 R. R. 725.

(xx) See ante, p. 182, note, and note (y), p. 23).

where the same person has been in legal occupation as tenant of the servient and dominant tenements (*y*) it is obvious that the user of the servient tenement by the common occupier could not be prevented by the owner of that tenement (*z*). The operation of the unity is to destroy the effect of the previous user by breaking the continuity of enjoyment (*u*). Qualities of the necessary enjoyment.

(VIII.) The enjoyment must be definite and sufficiently continuous in its character. Enjoyment to be definite.

“Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the (Prescription) Act” (*b*).

(IX.) The enjoyment must not have been either contrary to a statute of a public nature (*c*), or inconsistent with a custom (*d*).

(*y*) *Harbridge v. Warwick*, sup. See as to light, *Ladyman v. Grave*, 1871, 6 Ch. 763; and in the case of rights of way, *Damper v. Bassett*, 1901, 2 Ch. 350; 70 L. J. Ch. 657; *Hulbert v. Dale*, 1909, 2 Ch. 576; 79 L. J. Ch. 48.

(*z*) See *Outram v. Maude*, 1881, 17 Ch. D. 391, 405; 50 L. J. Ch. 783.

(*a*) See the cases quoted under s. 4 of the Prescription Act, ante, p. 200.

(*b*) *Smith v. Baxter*, 1900, 2 Ch. 138; per Stirling, J., at p. 146; 69 L. J. Ch. 437; and see *Hollins v. Verney*, 1884, 13 Q. B. D. 304; 53 L. J. Q. B. 430, and other cases quoted under s. 4 of the Prescription Act, ante, p. 200.

(*c*) *Neaverson v. Peterborough*, 1902,

1 Ch. 557; 71 L. J. Ch. 378. See *Traill v. McAlister*, 1890, 25 L. R. Ir. 524, where it was laid down that a prescriptive title cannot result from acts prohibited by statute.

As regards a statute of a private nature, a waiver may be presumed (*Goldsmid v. G. E. R.*, 1884, 25 Ch. D. 511; 1884, 9 App. Cas. 927; 54 L. J. Ch. 162; *A.-G. v. Grand Junction*, 1909, 2 Ch. 526; 78 L. J. Ch. 681; *Haynes v. Ford*, 1911, 1 Ch. 375; 80 L. J. Ch. 490).

(*d*) *Wynstanley v. Lee*, 1818, 2 Swans. 333; *Perry v. Eames*, 1891, 1 Ch. 667; 60 L. J. Ch. 345.

PART III.

OF PARTICULAR EASEMENTS AND PARTICULAR NATURAL RIGHTS OF A SIMILAR CHARACTER.



CHAPTER I.

RIGHTS IN RESPECT OF WATER.

IN dealing with the rights of riparian owners in respect of the water of a natural stream flowing through a defined channel, the first distinction to be borne in mind is the distinction between natural rights (see ante, p. 6) and prescriptive rights. The natural rights of a riparian owner may be shortly defined as threefold: First, he has a right of user. He can use the water for certain purposes (*a*). Secondly, he has a right of flow. He is entitled to have the water come to him and go from him without obstruction (*b*). Thirdly, he has a right of purity. He is entitled to have the water come to him unpolluted.

It is proposed in the present chapter to deal in Part 1 with a riparian owner's natural rights of user and flow in a natural watercourse; in Part 2 with his prescriptive rights of user and flow; and in Part 3 with artificial watercourses. Purity and pollution will be dealt with in Part 4.

PART 1.—NATURAL RIGHTS AS REGARDS USER AND FLOW IN NATURAL WATERCOURSE.

(I.) Natural rights of riparian owners in water flowing through a natural watercourse having a channel at once defined and known.

A. *Overground Watercourses.*

Running water is the subject of easements of several kinds. The right to receive a flow of water in a natural stream, and

Natural
rights in
natural
water-
courses.

(a) See post, p. 248.

(b) See per Lord Wensleydale, *Chase-*

more v. *Richards*, 1859, 7 H. L. C. 382;
28 L. J. Ex. 81; 115 R. R. 187.

transmit it in its accustomed course, is an ordinary right of property—a natural right: the right to interfere with the accustomed course, either by penning it back upon the land above, or transmitting it altered in quality or quantity to an extent not justified by natural right, is an easement. The right to have a natural stream run in its accustomed course does not arise by prescription, but “*jure naturæ*,” and of common right as an ordinary incident of property; the right to interfere with this natural course, by altering the quality or quantity of the water, is an easement, and is claimable by prescription (c).

Natural rights in natural water-courses.

“When a man has a lawful easement or profit by prescription, from time whereof, &c., another custom, which is also from time whereof, &c., cannot take it away; for the one custom is as ancient as the other; as if one has a way over the land of A. to his freehold by prescription, from time whereof, &c., A. cannot allege a prescription or custom to stop the said way” (d). The difficulty here suggested does not arise with regard to a natural stream, the right to the flow of it not arising by prescription; and if a man declares for a disturbance of the course of a stream, it is a good plea to justify the diversion in virtue of an easement so to do.

Bracton appears to consider the obligation to respect the natural course of a flowing stream as a duty imposed by law; and that, unless justified by an easement, a man has no more right to divert the course of a stream than to discharge water upon his neighbour’s land: “Item a jure imponitur servitus prædio vicinorum; scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur. Item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte” (e).

In the Courts of the United States, which profess to be guided by the principles of English law, this point has received consideration. In an elaborate judgment delivered by Story, J., in 1827 (f), the right to have a stream flow on in its accustomed course is laid down to be a right universally incident to the property in the adjoining land, a right which can only be interfered with by the acquisition of an easement; and the ordinary rights of the owners of the adjacent land to the natural flow of the stream are distinguished with great precision from the acquisitions in derogation

Story, J. : 1827.

(c) See the judgment of Farwell, L.J., *Mansell v. Valley Co.*, 1908, 2 Ch. 448; 77 L. J. Ch. 742.

(e) Bracton, lib. 4, f. 221 a.

(f) *Tyler v. Wilkinson*, 1827, 4 Mason, U. S. R. 397.

(d) *Aldred’s Case*, 1611, 9 Rep. 58 b.

Natural
rights in
natural
water-
courses.

of the common rights made by an exclusive appropriation of the water.

"Primâ facie," says Story, J., "every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ* (g). In virtue of this ownership (h) he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no

(g) See *Bickett v. Morris*, 1866, 1 H. L. Sc. 47; *Carlisle v. Graham*, 1869, 4 Exch. 361; 38 L. J. Ex. 226; *Zelland v. Glover Incorporation*, 1870, L. R. 2 H. L. Sc. 70; *Palmer v. Persse*, 1878, 1 R. 11 Eq. 616; *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839; *Micklethwait v. Newlay*, 1886, 33 Ch. D. 133; *Devonshire v. Pattinson*, 1887, 20 Q. B. D. 263; 57 L. J. Q. B. 189; *Tilbury v. Silva*, 1890, 45 Ch. D. 98; *Hindson v. Ashby*, 1896, 2 Ch. 1; 65 L. J. Ch. 515; *Great Torrington v. Moore Stevens*, 1904, 1 Ch. 347; 73 L. J. Ch. 124; cf. with case last cited, *Menzies v. Breadalbane* (No. 1), 4 F. 55. As to an enclosure award, see *Ecroyd v. Coulthard*, 1898, 2 Ch. 358; 66 L. J. Ch. 751.

(h) In *Lord v. Sydney*, 1859, 12 Moo. P. C. 473, it was argued that a riparian owner who is excluded from the ownership of the bed of the stream does not possess the rights of a riparian proprietor to the water. No decision was pronounced as to this, the claimant being held entitled to the bed; but their Lordships did not accede to the

argument. Cf. *Lyon v. Fishmongers' Co.*, 1876, 1 App. Cas. 662; 44 L. J. Ch. 68. "Lateral contact is as good as vertical" (*North Shore Rail. Co. v. Pion*, 1889, 14 App. Cas. 612; 59 L. J. P. C. 25). In the case of a navigable tidal river the soil belongs to the Crown (Com. Dig. art. Navigation A.; *Gann v. Fishers of Whitstable*, 1865, 11 H. L. C. 207; 35 L. J. C. P. 29; 145 R. R. 119) in the absence of evidence to the contrary (*A.-G. v. Emerson*, 1891, A. C. 649; 52 L. J. Q. B. 67). But there may be exclusive rights in the riparian owners. See *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139; 77 L. J. Ch. 529; *A.-G. v. Lonsdale*, 1868, 7 Eq. 397; 38 L. J. Ch. 335; *Lyon v. Fishmongers' Co.*, ubi sup.; *Original Hartlepool v. Gibb*, 1877, 5 Ch. D. 713; 46 L. J. Ch. 411; *Bell v. Quebec*, 1879, 5 App. Cas. 84; 49 L. J. P. C. 1; *Fritz v. Hobson*, 1880, 14 Ch. D. 542; 49 L. J. Ch. 735. In America a mere intruder on land has no riparian rights (*Watkins v. Holman*, 16 Pet. (U.S.) 25). Sed qu.

obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non lædas*.

Natural
rights in
natural
water-
courses.

“ But of a thing common by nature, there may be an appropriation by general consent or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land ; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant, is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law.”

Since the time of Story, J., the rules as to the natural rights of riparian owners in water flowing through a natural watercourse having a defined and known channel have been successively stated

Natural
rights in
natural
water-
courses.

Parke, B. :
1851.

by a series of great judges. Thus in 1851 Parke, B., laid down the law on this subject as follows (*i*) : “ The right to have a stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes ; flowing water is publici juris, not in the sense that it is a bonum vacans to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it ; that none can (*k*) have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it (*l*). This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state, but is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie. For such an use it will, even though there may be no *actual* damage to the plaintiff ” (*m*).

Lord
Kingsdown :
1858.

In 1858 Lord Kingsdown (*n*) said : “ By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition,

(*i*) *Embrey v. Owen*, 1851, 6 Exch. 369 ; 20 L. J. Ex. 312 ; 86 R. R. 331.

(*k*) Except by statute (*Medway v. Romney*, 1861, 9 C. B. N. S. 575 ; 30 L. J. C. P. 236 ; 127 R. R. 787).

(*l*) I.e., to the reasonable use of the stream for ordinary purposes, e.g., for his domestic purposes and his cattle (*Miner v. Gilmour*, cited in text, above), but not for purposes foreign to or unconnected with his riparian tenement (*McCartney v. Londonderry Co.*, 1904, A. C. 301 ; 73 L. J. P. C. 73).

(*m*) See judgment in *Sampson v. Hoddinott*, 1857, 1 C. B. N. S. 611 ; 26 L. J. C. P. 148 ; 107 R. R. 809 ; see

also 3 Kent's Commentaries, 439—445, quoted in the judgment in *Embrey v. Owen*, ubi sup.

(*n*) *Miner v. Gilmour*, 1858, 12 Moo. P. C. 156 ; 124 R. R. 3. Lord Kingsdown's judgment has been adopted ever since (*John White v. White*, 1906, A. C. 79 ; 75 L. J. P. C. 14. See *Norbury v. Kitchen*, 1863, 3 F. & F. 292 ; *Nuttall v. Bracewell*, 1866, L. R. 2 Ex. 9 ; 36 L. J. Ex. 1. Cf. as to the Roman-Dutch law, *Van Breda v. Silberbauer*, 1869, L. R. 3 P. C. 84 ; 39 L. J. P. C. 8 ; *French Hoek v. Hugo*, 10 App. Cas. 336 ; 54 L. J. P. C. 17).

he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation ; but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

Natural
rights in
natural
water-
courses.

In 1875 Lord Cairns again stated the law in *Swindon Co. v. Wills Co. (o)*, where the appellants, being riparian owners on the banks of a stream, claimed the right to collect the water of the stream into a permanent reservoir for the supply of an adjacent town ; and it was held that this was not a reasonable use of the water within the meaning of the above rules. "Undoubtedly," said Lord Cairns, L.C., "the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water. That is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, further, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done ; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable one. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.

Lord
Cairns :
1875.

"But, my Lords, I think your Lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner comes under the

(o) 1875, L. R. 7 H. L. 697 ; 45 L. J. Ch. 638. Lord Cairns' judgment has been said to have almost codified the law (*McCartney v. Londonderry Co.*, 1904, A. C. 304 ; 73 L. J. P. C. 73).

Natural
rights in
natural
water-
courses.

range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner. It is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes—and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream.”

Lord
Macnaghten:
1904.

Lastly, in 1904, Lord Macnaghten dealt with the law in *McCartney v. Londonderry Co. (p)*, where a railway line belonging to the respondents crossed a natural stream, and at the crossing abutted upon the stream for about eight feet on each side. The respondents inserted a pipe into the stream at the crossing, and by means of this pipe, which was laid along the strip of railway line, diverted water to other land belonging to them, about half a mile from the stream, and there consumed it in working their locomotive engines. The appellant, who was a lower riparian owner upon the stream, stopped the pipe, and thereupon the respondents brought their action for a declaration of their right to take the water through the pipe, and for an injunction. It was held, however, that the appellant was justified in the course taken by him, and the action failed. The following passage occurs in the speech of Lord Macnaghten: “There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of

(p) 1904, A. C. 301; 73 L. J. P. C. 73, overruling *Sandwich v. G. N. R.*, 1878, 10 Ch. D. 707; 49 L. J. Ch. 225. Cf. *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839, 856; *Rameshur v. Koonj*, 1878, 4 App. Cas. 121; *Roberts v. Richards*, 1882, 50 L. J. Ch. 297;

51 L. J. Ch. 944; W. N. 1881, p. 156; *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 155; 52 L. J. Q. B. 445; *Kensit v. G. E. R.*, 1884, 27 Ch. D. 122; 54 L. J. Ch. 19; *Roberts v. Gwyrfa*, 1899, 2 Ch. 608; 68 L. J. Ch. 757.

his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

Natural
rights in
natural
water-
courses.

“Now it seems to me that the first question your Lordships have to consider is, Under what category does the proposed user of the railway company fall? Certainly it is not the ordinary or primary use of a flowing stream, nor is it, I think, one of those extraordinary uses connected with or incidental to a riparian tenement which are permissible under certain conditions. In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower riparian owner can complain of that. In the exercise of rights extraordinary but permissible the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.”

The rules set out in the above judgments relate to the user and flow of overground water in a defined natural stream, to which user and flow every riparian owner has a natural right. These rules have been tersely expressed by Erle, C.J., in *Gaved v. Martyn* (q) as follows: “The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality.” To this may be added that as between himself and lower riparian owners the upper owner is not only bound to allow the water to flow on, but is entitled to insist that it shall flow on. “He has the right to have the natural stream come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction” (r). Any obstruction by a lower riparian owner of such a character that it might reasonably

Rights of
user and flow
of over-
ground water
in defined
channel.

(q) 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 352; 147 R. R. 739. *more v. Richards*, 1859, 7 H. L. C. 382; 20 L. J. Ex. 393; 115 R. R. 187.

(r) Per Lord Wensleydale, *Chase-*

Natural
rights in
natural
water-
courses.

User
ordinary and
extraordi-
nary.

Extra-
ordinary
user.
Manufac-
turing
purposes.

Irrigation.

be expected that injury would be caused to an upper riparian owner is actionable at the suit of the latter (*s*).

The question what is a lawful user of the water by each riparian owner in the exercise of his natural rights depends on the circumstances of each case, and it is impossible to define precisely the limits which sever the permitted use of the water from its wrongful application. Thus, as regards the distinction drawn above by Lord Macnaghten between the ordinary or primary purposes and the extraordinary or secondary purposes to which the riparian owner may apply the water, this distinction may be different in different places and at different times. It has been said that the user which was at one time extraordinary might by changes in the condition of the property become ordinary; and also that a user which might be extraordinary in an agricultural district might not be extraordinary in a manufacturing district (*t*).

Among purposes extraordinary but permissible Lord Cairns mentions manufacturing purposes, which were dealt with in *Dakin v. Cornish* (*u*), where Alderson, B., applied the test whether the same quantity of water continued to run in the river as if none of it had entered the manufacturing premises of the upper riparian owner. In dealing with the same user Vaughan Williams, L.J., laid down that the riparian owner must not interfere with the lawful use of the water by owners above or below him or inflict on them a sensible injury (*v*). Again, among extraordinary purposes, Lord Cairns mentions irrigation. As to this, Parke, B., said that if the irrigation takes place, not continuously, but at intermittent periods when the river is full, and no damage is done thereby to the working of a mill on the stream, and the diminution of the water is not perceptible to the eye, it is not prohibited (*w*). Irrigation has also been referred to as a perfectly legitimate mode of exercising the natural rights of an upper riparian owner if he thereby does not abridge the natural rights of a lower riparian owner—a result which would follow if the upper owner by irrigation exhausted the running stream (*x*).

(*s*) *Ambler v. Bradford*, 1902, 87 L. T. 217; 71 L. J. Ch. 744; *M'Glone v. Smith*, 1888, 22 L. R. Ir. 559; *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 856.

(*t*) Per Lord Esher, *Ormerod v. Todmorden*, 1883, 52 L. J. Q. B. 450; see 11 Q. B. D. 168.

(*u*) 1845, 6 Exch. 360.

(*v*) *Baily v. Clark*, 1902, 1 Ch. 665; 71 L. J. Ch. 396. See *Sharp v. Wilson*,

1905, 93 L. T. 55, where the Court held that for manufacturing purposes the defendants had dealt unreasonably with water.

(*w*) *Embrey v. Owen*, 1851, 6 Exch. 372; 20 L. J. Ex. 312; 86 R. R. 331.

(*x*) Per Coleridge, J., *Chasemore v. Richards*, 1857, 2 H. & N. 150; 20 L. J. Ex. 393; 115 R. R. 187. See also per Cresswell, J., *Sampson v. Hoddinott*, 1857, 1 C. B. N. S. 603; 26 L. J. C. P.

But the right of a riparian owner to an extraordinary use does not enable him to divert water to supply a lunatic asylum and county jail (*g*) or to supply a town (*z*). Nor did it enable a railway company who owned a tenement on a stream to divert water to a place outside that tenement and use it to supply locomotives along their line (*a*).

Natural rights in natural water-courses.

In connection with the question what user is permissible it may be mentioned that it is actionable to obstruct the free passage of salmon up a river (*b*). Rights with regard to the free passage and obstruction of salmon, which are regulated by statutory provision, have on several occasions come before the Courts (*c*). In *Barker v. Faulkner* (*d*) the question of the right to obstruct the passage of fish other than salmon arose, but was not determined. In that case the plaintiff and defendant were adjoining riparian owners upon a well-known trout stream. The defendant erected upon his own property an embankment or weir, with fenders and wire gratings, avowedly for the purpose of preventing fish from passing up the river to the plaintiff's close, whilst allowing them to swim down the river to the defendant's close, and in respect of this obstruction the plaintiff claimed an injunction. The action came on for argument on questions of law arising on the pleadings, and Stirling, J., after considering the cases with reference to salmon, thought that the principle involved in those authorities might extend to other fish, and declined to deal with the case on the materials then before him, ordering it to proceed in the ordinary course.

Passage of fish.

It seems that the use of artificial aids (as mill leats, &c.) by a riparian owner does not in any way affect his natural right to the use of the water. If the rights of other owners are not thereby infringed, he may employ such means as he thinks proper (*e*).

In dealing with riparian land it should not be forgotten that the natural rights above referred to are in law parts of the fee simple. Thus it was said by Parker, J. : " When a riparian owner sells part of his estate, including land on the banks of a natural stream, it is not necessary to make any express provision as to the grant or

Natural rights are part of fee simple.

148 ; 107 R. R. 809, where the question was as to the right to impede the flow by means of channels cut for irrigation.

(*g*) *Medway Co. v. Romney*, 1861, 9 C. B. N. S. 575 ; 30 L. J. C. P. 236 ; 127 R. R. 787.

(*z*) *Swindon Co. v. Wilts Co.*, 1875, L. R. 7 H. L. 704 ; 45 L. J. Ch. 638 ; *Roberts v. Gwyrfai*, 1899, 2 Ch. 612 ; 68 L. J. Ch. 757 ; *Owen v. Davies*, 1874, W. N. 175.

(*a*) *McCartney v. Londonderry*, 1904, A. C. 306 ; 73 L. J. P. C. 73.

(*b*) *Pirie v. Kintore*, 1906, A. C. 478.

(*c*) See *Weld v. Hornby*, 1806, 7 East, 195 ; 8 R. R. 608 ; *Rolle v. Whyte*, 1868, L. R. 3 Q. B. 286 ; 37 L. J. Q. B. 105 ; *Loamfield v. Lonsdale*, 1870, L. R. 5 C. P. 657 ; 39 L. J. C. P. 305.

(*d*) 1898, 79 L. T. 24.

(*e*) See *Ambler v. Bradford*, 1902, 87 L. T. 217 ; 71 L. J. Ch. 744.

Natural
rights in
natural
water-
courses.

reservation of the ordinary rights of a riparian proprietor. These rights are not easements to be granted or reserved as appurtenant to what is respectively sold or retained, but are parts of the fee simple and inheritance of the land sold or retained. If it be desired to alter or modify these rights, it can only be done by the grant or reservation of such rights in the nature of easements as the nature of the case may require. If no such rights are granted or reserved the vendor remains, and the purchaser becomes, a riparian owner, and retains or acquires all the ordinary rights of a riparian owner" (f). Where a riparian owner who had a prescriptive right to pollute the stream granted part of his land without any reservation, he could not as between himself and the grantee continue to pollute (g).

Who are
riparian
owners.

With respect to the question who are riparian owners and as such entitled to natural rights in respect of the water of an over-ground stream in a defined channel, it is settled that the rights of a riparian owner do not depend on his ownership of the soil of the stream (h). To give rise to the existence of riparian rights it is necessary that the land in respect of which they are claimed should be in contact with the flow of the stream, but lateral contact is as good jure naturæ as vertical (i). In the case of a tidal river the foreshore of which is left bare at low water, it was said that, although such bank is not always in contact with the flow of the stream, it is in such contact for a great part of every day in the regular course of nature; which fact is an amply sufficient foundation for a natural riparian right (j). Where a riparian owner grants away a part of his land not abutting on the stream the grantee has no water rights in respect of such part (k). Again, it has been held that a lessee of mines under land adjoining a stream, and who also enjoys a grant from the surface owner of the use of the water for colliery purposes, is not as regards the user of the water a riparian owner (l). The

(f) *Portsmouth Waterworks Co. v. L. B. & S. C. R.*, 1909, 26 Times L. R. 175.

(g) *Crossley v. Lightowler*, 1866, 3 Eq. 279; 2 Ch. 478; 36 L. J. Ch. 584.

(h) *Lyon v. Fishmongers' Co.*, 1876, 1 App. Cas. 673; 46 L. J. Ch. 68. See *Jones v. Llanrwst*, 1911, 1 Ch. 402; 80 L. J. Ch. 145; *Lord v. Sydney*, 1859, 12 Moo. P. C. 473, 496; 124 R. R. 113. It should be remembered that in the case of land bounded by a non-navigable stream the ownership is presumed to extend ad medium filum of the soil of the stream (*City of London Commrs.*

v. Central London R., 1913, A. C. 379; 82 L. J. Ch. 274); even where the conveyance appears to exclude the soil (*Mellor v. Walmsley*, 1905, 2 Ch. 179; 74 L. J. Ch. 475).

(i) *North Shore v. Pion*, 1889, 14 App. Cas. 621; 59 L. J. P. C. 25.

(j) *Ibid.*

(k) *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 169; 52 L. J. Q. B. 445; *Stockport v. Potter*, 1864, 3 H. & C. 326; 31 L. J. (N. S.) Ex. 9; 40 R. R. 453.

(l) *Insole v. James*, 1856, 1 H. & N. 243; 108 R. R. 548.

position of a person holding from a riparian owner a licence to use the water of the stream was dealt with in *Stockport Co. v. Potter* (*m*), *Ormerod v. Todmorden* (*n*), and *Kensit v. G. E. R.* (*o*), cases which are discussed post, p. 282.

Reverting to the earlier forms in which the law as to water rights was stated, it seems that in discussing the question whether the right to receive the water is one of the ordinary incidents of the ownership of the soil, or an additional right claimed as an easement, a misconception formerly took place. The right to the corporeal thing, water itself, was confounded with the incorporeal right to have the stream flow in its accustomed manner (*p*). Upon this a further error was founded—that the first occupant or appropriator of water had a right to continue to divert the stream to the extent of such appropriation, no matter how injurious such diversion might be to the rights of parties who should afterwards seek to use the stream. The question was debated—what nature of property existed by law, or could exist, in air, light, and water. It was attempted to rest that right to the enjoyment of these elements upon the first occupancy of a common right. Thus, Blackstone, in his chapter on “Title by Occupancy,” after remarking that a property in goods and chattels might be acquired by occupancy—“the original and only primitive method of acquiring any property at all”—laid it down, that “the benefit of the elements—light, air, and water—can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour’s ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. If my neighbour makes a tanyard, so as to annoy, and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbour’s prior mill or his meadow, for he hath, by the first occupancy, acquired a property in the current” (*q*). The last two illustrations of Blackstone, however, are directly at variance with the later decisions upon this subject (*r*). And the question has now

Natural rights in natural water-courses.

First occupant acquires no right to divert.

Blackstone.

(*m*) 1864, 3 H. & C. 300; 31 L. J. (N. S.) Ex. 9; 140 R. R. 453.

(*n*) 1883, 11 Q. B. D. 155; 52 L. J. Q. B. 445.

(*o*) 1884, 27 Ch. D. 122; 54 L. J. Ch. 19.

(*p*) *Mason v. Hill*, 1833, 5 B. & Ad. 19; 2 Nev. & M. 747; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354.

(*q*) 2 Bl. Com. 402.

(*r*) *Bliss v. Hall*, 1838, 4 Bing. N. C. 183; 7 L. J. (N. S.) C. P. 122; 44 R. R.

Natural
rights in
natural
water-
courses.

been set at rest by the considered judgment of Lord Denman, C.J., in *Mason v. Hill* (s), in which he lays down that there is no authority in English law that the first occupant, though he may be proprietor of the land above, has any right by diverting the stream to deprive the owner of the land below of the natural flow of the water. "It has long been established that the first occupant cannot acquire an exclusive right to running water" (t).

No act of
appropriation
necessary.

It was also at one time made a question whether the simple fact of water running in a natural channel through land was sufficient to confer upon the landowner the right to control his neighbour's interference, or whether there must be some tangible perception or active appropriation by the landowner of the benefit of the water (u). It is now settled that no act of appropriation is necessary (v). It has in effect been decided that every proprietor of land along the stream has, without ever having used the water, a right to maintain an action against any person who diverts it, unless the person so diverting it has acquired a legal title to do so, if the diversion diminishes the flow of water to an extent greater than that necessarily incident to the reasonable use of the water by the proprietor above in the exercise of his similar right. For instance, if a person erects a mill, and thereby interferes with the course of the stream to such an extent, he is liable to an action for such diversion at the suit of any proprietor of land lying lower down the stream, although the latter has never applied the water to a beneficial purpose, and brings an action only one day before the time requisite to give the owner of the mill a prescriptive right to a use of the water exceeding the natural right (w).

To maintain
action not
necessary to
show
damage.

Again, questions were formerly raised whether it was necessary

697, post; *Mason v. Hill*, 1833, 3 B. & Ad. 304; 5 B. & Ad. 1; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354; *Sturges v. Bridgman*, 1878, 11 Ch. D. 852; 48 L. J. Ch. 785.

(s) 1832, 5 B. & Ad. 1; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354, where the earlier authorities are reviewed at length.

(t) Per Bowen, L.J., *Ormerod v. Todmorden*, 1833, 11 Q. B. D. 171; 52 L. J. Q. B. 445.

(u) See *Bealey v. Shaw*, 1805, 6 East, 208; 8 R. R. 466; *Saunders v. Newman*, 1817, 1 B. & Ald. 258; 19 R. R. 312; *Williams v. Morland*, 1824, 2 B. & C. 910; 2 L. J. K. B. 191; 26 R. R. 579; and the considered judgment of Lord Denman in *Mason v. Hill*, 1833, 5 B. & Ad. 1; 2 L. J. (N. S.)

K. B. 118; 39 R. R. 354.

(v) *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 854.

(w) See the judgments in *Embrey v. Owen*, 1851, 6 Exch. 368; 20 L. J. Ex. 312; 86 R. R. 331; and *Sampson v. Hoddinott*, 1857, 1 C. B. N. S. 611; 26 L. J. C. P. 148; 107 R. R. 809, where the action was by a *reversioner*; also *Wood v. Waud*, 1849, 3 Exch. 772; 18 L. J. Ex. 305; 77 R. R. 809; *Miner v. Gilmour*, 1858, 12 Moo. P. C. 156; 124 R. R. 3; and *Crossley v. Lightowler*, 1866, 3 Eq. 296; 36 L. J. Ch. 584; *Roberts v. Gwyrfai*, 1899, 2 Ch. 608; 68 L. J. Ch. 707; *McCartney v. Londonderry Co.*, 1904, A. C. 301; 73 L. J. P. C. 73; *Sharp v. Wilson*, 1905, 93 L. T. 155.

to show actual damage to maintain an action for the diversion or obstruction of water. But it is now settled that no actual damage need be shown, if the rights of riparian owners in respect of the flow of the stream in its natural state be infringed (*x*). It is conceded that deterioration of the value of the premises is sufficient to confer a right of action (*y*); and it is scarcely possible to imagine a case in which diversion or obstruction of a running stream of water would not result in diminishing the value of the land through which it flows (*z*). Even assuming, however, that no actual damage is shown to arise from the diversion or obstruction, an action may be maintained on the ground that the undisturbed continuance of such acts without the express consent of the landowner would be evidence of a right to do them (*a*).

Natural rights in natural water-courses.

This principle, that no actual damage need be shown to have been caused in order to sustain an action for diversion of water, applies equally to the right to a flow of water acquired by a grant or user as to the natural right (*b*). And it also applies to the diversion of water from an artificial watercourse, when there is a right to the flow of such water (*c*).

B. Underground Watercourses.

As regards water flowing through a natural watercourse having a channel at once defined and known but which is underground, the owner of the soil under which the water flows can maintain an action

Underground water-courses with channel defined and known.

(*x*) *Roberts v. Gwyrfai*, 1899, 2 Ch. 608; 68 L. J. Ch. 707; *McGlone v. Smith*, 1888, 22 L. R. Ir. 559.

(*y*) Per Holroyd, J., in *Williams v. Morland*, 1824, 2 B. & C. 916; 2 L. J. K. B. 191; 26 R. R. 579.

(*z*) See *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823.

(*a*) *Young v. Spencer*, 1829, 10 B. & C. 145; 8 L. J. (O. S.) K. B. 106; *Baxter v. Taylor*, 1832, 4 B. & Ad. 72; 2 L. J. (N. S.) K. B. 65; 38 R. R. 227; *Hopwood v. Scholfield*, 1837, 2 Mood. & R. 34. See judgment of Coleridge, J., *Rochdale Co. v. King*, 1849, 14 Q. B. 135; 18 L. J. Q. B. 293; 80 R. R. 222; *Wood v. Waud*, 1849, 3 Exch. 772; 18 L. J. Ex. 305; *Swindon Co. v. Wilts Co.*, quoted above, p. 245; *Pennington v. Brinsop*, 1877, 5 Ch. D. 769; 46 L. J. Ch. 773; *Sharp v. Wilson*, 1905, 93 L. T. 155. In *Kensit v. G. E. R.*, 1884, 27 Ch. D. 122; 54 L. J. Ch. 19, water was taken from a river and used by the licensee of an

upper riparian owner for purposes unconnected with such owner's tenement—a user which *prima facie* was wrongful. See *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 155; 52 L. J. Q. B. 445. But a lower riparian owner was refused an injunction on the ground that the water taken was returned undiminished in quantity and undeteriorated in quality; so that the user of the lower owner was not in fact interfered with and the acts of the licensee could never grow into a prescriptive title. See *McCartney v. Londonderry Co.*, 1904, A. C. 313; 73 L. J. P. C. 73.

(*b*) See *Northam v. Hurley*, 1853, 1 El. & Bl. 665; 22 L. J. Q. B. 183; 93 R. R. 329; and *Martin, B.*, in his judgment in *Rawstron v. Taylor*, 1855, 11 Exch. 369; 25 L. J. Ex. 33; 105 R. R. 567; and cf. *Harrop v. Hirst*, 1868, 4 Exch. 43; 38 L. J. Ex. 1.

(*c*) *Rochdale Canal Co. v. King*, 1849, 14 Q. B. 122; 20 L. J. Ch. 675; 80 R. R. 222.

Natural rights in natural water-courses.

for diversion or obstruction if it took place under such circumstances as would have enabled him to recover if the watercourse had been wholly above ground (*d*).

Natural water-courses having channel defined but unknown.

(II.) Natural rights of riparian owners in water flowing through a natural watercourse having a channel defined but (as being only ascertainable by excavation) not known.

This case is governed by a rule similar to that stated below as to undefined channels ; the result being that the lower riparian owner has no right of flow and cannot restrain diversion (*e*).

Overground water percolating through undefined channel.

(III.) Natural rights in overground water flowing or percolating through an undefined channel.

The natural right to the flow of water applies only to water flowing in some defined natural channel ; and therefore the owner of land upon which there is surface water rising out of springy or boggy ground and flowing in no definite channel, or water rising occasionally at one spot but having no defined course, has a right to get rid of such water by draining the land or in any way he pleases, although, if not so disposed of, it might ultimately have reached the course of a natural stream (*f*). The Court laid down that the right of the riparian owner to the natural flow of water cannot extend further than the right to the flow of the stream itself and to the water flowing in some *defined* (*g*) natural channel, either subterranean

(*d*) *Dickenson v. Grand Junction Co.*, 1852, 7 Ex. 301; 21 L. J. Ex. 241; *Chasemore v. Richards*, 1859, 7 H. L. C. 374, 384; 20 L. J. Ex. 393; 115 R. R. 187. See *Black v. Ballymena*, 1886, 17 L. R. Ir. 459, where an explanation is given of "known channel" and "defined channel" as follows:—By "known" is meant the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground. The word is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. By "defined" is meant a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. Compare the judgment of Farwell, J., in *Bradford v. Ferrand*, 1902, 2 Ch. 655; 71 L. J. Ch. 859.

(*e*) *Bradford v. Ferrand*, 1902, 2 Ch. 655; 71 L. J. Ch. 859; *Ewart v. Belfast*,

1881, 9 L. R. Ir. 172.

(*f*) *Rawstron v. Taylor*, 1855, 11 Exch. 369; 25 L. J. Ex. 33; 105 R. R. 567.

(*g*) "A watercourse consists of bed, banks, and water; yet the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshet or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above, and it may at times be dry; but it must have a well-defined and substantial existence" (Angell on Watercourses. Compare

or on the surface, communicating directly with the stream itself. And in *Broudbent v. Ramsbotham* (*h*) the owner of the soil was held not to be liable to an action for draining a pond the water of which occasionally, when it exceeded a certain depth, escaped and squandered itself over the surface, some of it augmenting a natural stream, but by no defined channel.

Natural rights in natural water-courses.

(IV.) Natural rights in underground water flowing or percolating through an undefined channel.

Underground water percolating through undefined channel.

In this case the above rules as to the natural rights of riparian owners do not apply. For it is settled by *Chasemore v. Richards* (*i*) that every man has the right to divert or appropriate all water of this nature which he can find on his own land (*j*). "Percolating water below the surface of the earth is a common reservoir in which nobody has any property, but of which everybody has (as far as he can) the right of appropriating the whole (*k*). And this right the landowner can exercise notwithstanding that the stream which the neighbour owns may be diminished in consequence of the diverted or appropriated water not coming into it (*l*). Again, it has been laid down that no action will lie against a man who by digging in his own land drains his neighbour's land either by intercepting the flow of water percolating through the soil, or by causing water already collected on his neighbour's soil to percolate away (*m*).

The law on the above subject was discussed at length in *Acton v. Blundell* (*n*), which decided that the owner of Blackacre through which underground water percolated in an undefined channel has no interest in such water which will enable him to maintain an action against a neighbour who by mining in the usual manner in his own

the explanation stated above of "defined channel" in *Black v. Ballymena*, 1886, 17 L. R. Ir. 459).

(*h*) 1856, 11 Exch. 602; 25 L. J. Ex. 115; 105 R. R. 673.

(*i*) 1859, 7 H. L. C. 376; 29 L. J. 81; 115 R. R. 187.

(*j*) *Ballard v. Tomlinson*, 1885, 29 Ch. D. 123; 54 L. J. Ch. 454; *Salt Union v. Brunner*, 1906, 2 K. B. 822; 76 L. J. K. B. 55; *English v. Metropolitan Board*, 1907, 1 K. B. 602; 76 L. J. K. B. 361. But an express grant of all streams that might be found in certain closes prevented the grantor from working mines under adjoining land so as to divert underground water from wells in the closes (*Whitehead v. Parkes*, 1858, 2 H. & N. 870; 27 L. J.

(N. S.) Ex. 169; 115 R. R. 863).

(*k*) 29 Ch. D. 121.

(*l*) *Bradford v. Pickles*, 1895, A. C. 586; 64 L. J. Ch. 759.

(*m*) *Ballacorkish Co. v. Harrison*, 1873, L. R. 5 P. C. 60; 43 L. J. P. C. 19, where this rule was held to apply between a surface owner and the mine owner.

(*n*) 1843, 12 M. & W. 324; 13 L. J. Ex. 289; 67 R. R. 361. See *New River Co. v. Johnson*, 1860, 2 El. & El. 435; 29 L. J. (N. S.) M. C. 93 (deciding that there is no distinction for this purpose between water already collected in a well and water which would otherwise have flowed into it); *R. v. Metropolitan Board*, 1863, 3 B. & S. 710; 32 L. J. (N. S.) Q. B. 105.

Natural
rights in
natural
water-
courses.

Acton v.
Blundell.

land lays dry a well on Blackacre. The judgment of Tindal, C.J., contains the following passages, which, in view of their importance, are retained here at length :—

“ The question argued before us has been in substance this, whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface.

“ The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established. Each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above or below ; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King’s Bench in the case of *Mason v. Hill* (o), and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard* (p) ; and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

“ But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

“ The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious ; that the enjoyment has been long continued—in ordinary cases, indeed, time out of

(o) 1833, 5 B. & Ad. 1 ; 2 Nev. & M.
747 ; 2 L. J. (N. S.) K. B. 118 ; 39
R. R. 354.

(p) 1823, 1 S. & S. 190 ; 1 L. J.
(O. S.) Ch. 94 ; 24 R. R. 169.

mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the Courts of the United States (*q*), as ‘an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law.’ But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the progress of time. It may well be, that it is only yesterday’s date, that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

“But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire

Natural
right—in
natural
water-
courses.
*Acton v.
Blundell.*

(*q*) 4 Mason’s (American) Reports, 401.

Natural
rights in
natural
water-
courses.
Acton v.
Blundell.

by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers when too late that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle ; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined : in the present case the nearest coal-pit is at the distance of half a mile from the well ; it is obvious the law must equally apply if there is an interval of many miles.

“Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other ; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust ; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

“No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber* (r), which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land ; but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the Court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott* (s) is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of

(r) 1810, 3 Taunt. 99 ; 12 R. R. 604.

(s) 1838, 3 M. & W. 230 ; 7 L. J. (N. S.) Ex. 101 ; 49 R. R. 578.

easement, for support or otherwise, over the adjoining land of his neighbour. It is said in that case, ‘ he has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect.’ It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbour as to require the support of a rib of clay or of stone in his neighbour’s land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water ; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff’s boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant’s boundary ; which is, in substance, the very case before us.

Natural
rights
in natural
water-
courses,
*Acton v.
Blundell.*

“ The Roman law forms no rule, binding in itself, upon the subjects of these realms ; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.

“ The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants ; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, De aquâ et aquæ pluviae arcendæ, s. 12, ‘ Denique Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem : et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.’

“ It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years ; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath its surface ; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water ; that the person who owns the surface may dig therein, and apply all that is there

Natural
rights in
natural
water-
courses.

Acton v.
Blundell.

found to his own purposes at his free will and pleasure ; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action."

In *Salt Union v. Brunner* (t) the principle of *Acton v. Blundell* was applied, although the underground liquid drawn off by the defendants in the course of pumping operations carried on by them on their own land was brine mainly formed by the dissolution of rock-salt in the plaintiffs' salt mines, and although it was found as a fact that the defendants had, by such operations, abstracted a large quantity of salt from the beds of rock-salt belonging to the plaintiffs, and that if the defendants' brine-pumping was continued more of the plaintiffs' rock would be dissolved, and the salt abstracted therefrom. Notwithstanding these facts it was held that the defendants were guilty of no actionable wrong.

As to the right of support which has been claimed from underground water, the authorities are collected in Part III., Chap. 6, post.

The decision in *Grand Junction Co. v. Shugar* (u), which seems inconsistent with the rule above stated as to percolating underground water, must be explained as relating to a direct tapping of an over-ground stream flowing in a defined channel, and not to a mere withdrawal of percolating underground water (x).

The principles laid down in *Acton v. Blundell* also apply where the surface and the mines beneath it belong to different owners, the surface having been granted and the mines retained. The owner of the mine is not responsible if, in working the mines, he drains the water from the surface. "The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include. The absolute ownership is held not to include a right to be protected from loss of water by percolation into openings made in the soil of the neighbouring owner. How then can the grant of the surface only be held to include such a protection? To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines is an almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water

(t) 1906, 2 K. B. 822 ; 76 L. J. K. B. 55. As to subsidence caused by the pumping of brine, see the Brine Pumping (Compensation for Subsidence) Act, 1891.

(u) 1871, 6 Ch. 483 ; see the report

24 L. T. 402.

(x) *Jordeson v. Sutton Co.*, 1899, 2 Ch. 251 ; 68 L. J. Ch. 457 ; *English v. Metropolitan Board*, 1907, 1 K. B. 601 ; 76 L. J. K. B. 361.

by percolation, the owner of the surface would hold the owner of the mines at his mercy : for he would be entitled by injunction to inhibit the working of mines at all. It is not at variance with this view that the case of *Whitehead v. Parks* was decided, because in that case there was a lease and a distinct grant of the injured springs eo nomine " (y). If, however, the grant of the surface were made for some express purpose necessarily and obviously requiring the continuance of a supply of surface water, the principle laid down in the above passage might come into conflict with the principle involved in the decisions cited above (z) upon the maxim that a man may not derogate from his own grant. It is conceived, however, that even in such a case the surface owner could not claim a continuance of the surface water so as to prevent the working of the minerals. The reservation of the minerals would, it is thought, include all the natural and legal incidents consequent upon the working necessary to win them.

Natural
rights in
natural
water-
courses.

As will have been seen above, the rules regulating the right of flow laid down as to water flowing in an undefined channel differ from those which apply to defined channels. And in the case of water flowing from surface springs there is often a difficulty in distinguishing whether they fall under the rules as to defined or undefined channels (a). Where a natural defined stream issued from a springhead, it was held that the "stream" began at the springhead, and that the owner of the land could only take such water from either as was incident to his right as riparian owner (b). The same principle applied even where at some remote period the springhead had been built round (c).

Surface
springs.

By the civil law every man had a right to dig in his own land for the purpose of improving it, although he should thereby intercept the water which supplied his neighbour's fountain (d).

Civil law.

(y) *Ballacorkish Co. v. Harrison*, 1873, L. R. 5 P. C. 63; 43 L. J. P. C. 19; see *Littledale v. Lonsdale*, 1899, 2 Ch. 233. As to a mine owner's rights in working his mines, see also the Scotch decision in *Scots Mines Co. v. Leadhills*, 1859, 34 L. T. 34.

(z) Ante, p. 110.

(a) See *Ennor v. Barwell*, 1860, 2 Giff. 423; 128 R. R. 170; *Briscoe v. Drought*, 1860, 11 Ir. C. L. R. N. S. 250.

(b) *Dudden v. Clutton Union*, 1857, 1 H. & N. 627; 26 L. J. Ex. 146; 108 R. R. 752; *Bunting v. Hicks*, 1894,

70 L. T. 458; *Ewart v. Belfast*, 1881, 9 L. R. Ir. 172.

(c) *Mostyn v. Atherton*, 1899, 2 Ch. 360; 68 L. J. Ch. 629.

(d) Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.—Dig. 39, 3, 1, § 12, de aq. et aq. pl. arc.

Si in meo aqua irrumpat, quæ ex tuo fundo venas habeat si eas, venas incideris, et ob id desieret ad me aqua pervenire, tu non videris vi fecisse, si nulla

Prescriptive rights in natural watercourses.

Prescriptive rights in the case of water in natural stream with defined channel.

PART 2.—PRESCRIPTIVE RIGHTS IN NATURAL WATERCOURSES.

(I.) *Rights of User and Flow where Channel defined.*

In the case of water flowing through a natural watercourse with a defined channel, rights may be acquired by prescription which interfere with what would otherwise be the natural rights of other proprietors above and below (*e*). A riparian owner may by user acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up or lower down the stream, unless the user affects the use such landowner has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above or below a servient tenement (*f*). Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or Act of Parliament (*g*). In *Prescott v. Phillips* (*h*) it was ruled "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream and to whom it was injurious. The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, can be created only by grant, or enjoyment from which a grant may be presumed, or by statute. Such an easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance" (*i*).

Of the prescriptive rights which may be acquired by a riparian owner, the following are instances:—He may acquire the right to pen back a stream (*k*), or to divert part of a stream by means of a stone (*l*). So a lower riparian owner can acquire a right to place a hatch on the land of the upper owner to regulate the flow of water (*m*)

servitus mihi eo nomine debita fuerit; nec interdicto "Quod vi aut clam" teneris.—Dig. 39, 3, 21.

Vide etiam Dig. 39, 2, 24, § 12, de damno infecto.

(*e*) *John White v. White*, 1906, A. C. 80; 75 L. J. P. C. 14.

(*f*) *Sampson v. Hoddinott*, 1857, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

(*g*) *Bealey v. Shaw*, 1805, 6 East, 208; 8 R. R. 466; *Cox v. Matthews*, 1673, 1 Vent. 237; 2 Wms. Saund. 113 b; see *Dewhurst v. Wrigley*, 1834, C. P. Coop. 329.

(*h*) 1798, cited *Bealey v. Shaw*,

6 East, 213; *Mason v. Hill*, 1833, 5 B. & Ad. 23; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354.

(*i*) Per Cockburn, C.J., *Mason v. Shrewsbury R. Co.*, 1871, L. R. 6 Q. B. 587; 40 L. J. Q. B. 293. See, however, the opinion of Blackburn, J., in same case.

(*k*) *Cooper v. Barber*, 1810, 3 Taunt. 110; 12 R. R. 604.

(*l*) *Holker v. Porritt*, 1875, L. R. 10 Ex. 62; 44 L. J. Ex. 52.

(*m*) *Wood v. Hewitt*, 1846, 8 Q. B. 913; 15 L. J. Q. B. 247; 77 R. R. 689; *Moody v. Steggles*, 1879, 13 Ch. D.

or for the latter purpose to go on the land of the upper owner and open lock gates (*n*). So the lower riparian owner can acquire a right to go on the land of an upper riparian owner and bank up the stream (*o*). Again, the right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted (*p*). And even in a navigable river a riparian owner can acquire an interest in its water power as derived from a reservoir artificially formed by a dam across the channel (*q*). It should be noted here that the 2nd section of the Prescription Act refers to a claim to a watercourse—words which have been held to include a claim to have water which would otherwise flow down to the plaintiff's land diverted over other land (*r*).

Prescriptive rights in natural water-courses.

By the civil law a servitude of water flowing in its accustomed course might be obtained by the enjoyment of a stream of water during the requisite period; and although originally no such right could be valid, unless binding upon the owner of the land in which the spring rose, yet this rule was afterwards relaxed (*s*). Such a servitude appears to have been valid if the water increased the value of the dominant estate, or was capable of being appropriated to a purpose of utility (*t*), or even of pleasure (*u*).

Civil law.

266; 48 L. J. Ch. 639; see *Greenlade v. Halliday*, 1830, 6 Bing. 379; 8 L. J. C. P. 124; 53 R. R. 241.

(*n*) See *Simpson v. Godmanchester*, 1897, 1 Ch. 696; 66 L. J. Ch. 770. Compare *Beeston v. Wade*, 1856, 5 E. & B. 986; 25 L. J. Q. B. 115, where A., a non-riparian owner, was held to have acquired an easement to go on the land of B., an adjoining riparian owner, to turn water from a natural stream into an artificial watercourse which passed from the stream across B.'s land to A.'s land, and to repair such watercourse.

(*o*) *Roberts v. Fellowes*, 1906, 94 L. T. 279.

(*p*) *Rolle v. Whyte*, 1868, L. R. 3 Q. B. 286; 37 L. J. Q. B. 105; *Leconfield v. Lonsdale*, 1870, L. R. 5 C. P. 657; 39 L. J. C. P. 305; *Barker v. Faulkner*, 1898, W. N. 69.

(*q*) *Hamelin v. Bannerman*, 1895, A. C. 237; 64 L. J. P. C. 66.

(*r*) *Mason v. Shrewsbury Co.*, 1871, L. R. 6 Q. B. 578; 40 L. J. Q. B. 293. See *Staffordshire Co. v. Birmingham Co.*, 1866, L. R. 1 H. L. 254; 35 L. J. Ch. 257.

(*s*) *Servitus aquæ duvendæ vel hauriendæ, nisi ex capite vel ex fonte,*

constitui non potest; hodie tamen ex quocunque loco constitui solet.—Dig. 8, 3, 9, de serv. pred. rust.

Si aquam per possessionem Martialis eo sciente duxisti, servitutem exemplo rerum immobilium tempore quesisti.—Cod. 3, 34, 2, de serv. et aquâ.

(*t*) Si manifestè doceri possit jus aquæ ex vetere more atque observatione per certa loca profluentis utilitatem certis fundis irrigandi causâ exhibere; procurator noster ne quid contra veterem (formam) atque solemnem morem innovetur, providebit.—Ib. 7.

Labeo scribit, etiam si prætor hoc interdicto de aquis frigidis sentiat: tamen de calidis aquis interdicta non esse deneganda. Namque harum quoque aquarum usum esse necessarium: nonnunquam enim refrigeratæ usum irrigandis agris præstant: his accedit, quod in quibusdam locis, et quum calidæ sunt, irrigandis tamen agris necessarie sunt—ut Hierapoli: constat enim apud Hierapolitanos in Asiâ agrum aquâ calidâ rigari. Et quamvis ea sit aqua, quæ ad rigandos non sit necessaria, tamen nemo ambiget his interdictis locum fore.—Dig. 43, 20, 1, § 13, de aquâ quot. et aest.

(*u*) Hoc jure utimur ut etiam non ad

Prescriptive rights in natural water-courses.

No prescription in water with undefined channel.

Chasemore v. Richards.

(II.) *Rights of User and Flow where Channel undefined.*

In the case of water which percolates in an undefined course, no right to the uninterrupted flow can be acquired by prescription, for as regards this water no grant can be presumed (*v*). Similarly it has been held that a claim to have water percolate through the banks of a stream cannot be established by prescription (*w*). The principle governing these cases was settled by *Chasemore v. Richards* (*x*), where the House of Lords approved and acted on the unanimous opinion of the judges, delivered by Wightman, J. This opinion, in view of its importance, is set out at length as follows:—

“ It appears by the facts that are found in this case, that the plaintiff is the occupier of an ancient mill on the river Wandle, and that for more than sixty years before the present action he and all the preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied, above the plaintiff's mill, in part by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part rising to the surface, and part finding its way underground in courses which continually vary. The defendant represents the members of the Local Board of Health of Croydon, who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and about a quarter of a mile from the river Wandle, and pumped up large quantities of water from their well for the supply of the town of Croydon; and by means of the well and the pumping, the local board of health did divert, abstract, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill; and the quantity so diverted, abstracted, and intercepted was sufficient to be of sensible value towards the working of the plaintiff's mill. The question is, whether the plaintiff can maintain an action against the defendant for this diversion, abstraction, and interception of the underground water.

“ The law respecting the right to water flowing in definite, visible

irrigandum, sed pecoris causâ vel amœnitatis, aqua duci possit.—Dig. 43, 20, 3.

(*v*) *Chasemore v. Richards*, 1859, 7 H. L. C. 349, 370, 385; 29 L. J. Ex.

81; 115 R. R. 187.

(*w*) *Roberts v. Fellowes*, 1906, 94 L. T. 281.

(*x*) *Ubi sup.*

channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in *Embrey v. Owen* (z). But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case, has been recognized and observed upon by many judges whose opinions are of the greatest weight and authority.

" In *Raewstron v. Taylor* (a), Baron Parke says, ' This is the case of common surface water flowing in no definite channel, though contributing to the supply of the plaintiff's mill. The water having no definite course, and the supply not being constant, the plaintiff is not entitled to it. The right to have a stream running in its natural direction does not depend upon a supposed grant, but is jure nature.' In *Broadbent v. Ramsbotham* (b) Baron Alderson observes, that ' all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook ; but this does not prevent the owner of the land on which it falls from dealing with it as he may please, and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel. There is here no watercourse at all.' In *Acton v. Blundell* (c) the Court of Exchequer Chamber was of opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action.

" There is no case or authority of which I am aware that can be cited in support of the position contended for by the plaintiff, or in which the right to subterranean percolating water adverse to that of the owner of the soil came in question, except the *nisi prius* case of *Balston v. Bensted* (d), and *Dickinson v. The Grand Junction Canal Co.* (e). In the first of these cases, Lord Ellenborough is reported to have expressed an opinion that twenty years' enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent

Prescriptive rights in natural water-courses.

Chasemore v. Richards.

(z) 1851, 6 Exch. 353 ; 20 L. J. Ex. 312 ; 86 R. R. 331.

(a) 1855, 11 Exch. 382 ; 25 L. J. Ex. 33 ; 105 R. R. 567.

(b) 1855, 11 Exch. 602, 615 ; 25 L. J. Ex. 115 ; 105 R. R. 673.

(c) 1843, 12 M. & W. 324 ; 13 L. J. Ex. 289 ; 67 R. R. 361.

(d) 1808, 1 Camp. 463.

(e) 1852, 7 Exch. 282 ; 21 L. J. Ex. 241.

Prescriptive
rights in
natural
water-
courses.
*Chasemore v.
Richards.*

judge, followed by no decision upon the point, for the case ended in the withdrawal of a juror, and is directly at variance with the judgment of the Court of Exchequer in the other case, upon which the plaintiff relies, of *Dickinson v. The Grand Junction Canal Co.*, in which the Court declared (f) 'that the right to have a stream running in its natural course is *not* by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land.' In *Dickinson v. The Grand Junction Canal Co.* the very question now before your Lordships' house arose, and that case is relied upon by the plaintiff as a decisive authority in his favour. The Court of Exchequer was of opinion that the company, by digging a well and pumping out the water, and so intercepting and diverting underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff's mill, and was applied to the working of it, had become liable to an action for the infringement of a right at common law. In the same judgment, however, the Court refers (g) to the case of *Acton v. Blundell* apparently with approbation, and observes, 'that the existence and state of underground water is generally unknown before a well is made; and after it is made there is a difficulty in knowing certainly how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbour. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters.' But the Court, without at all adverting to this distinction which it had adopted, treated the case of underground percolating water as governed by the same rules as would obtain in the case of visible streams and watercourses above ground; and no remark or comment was made or reason assigned by the Court for arriving at a conclusion which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them. The plaintiff in that case was held to have a cause of action, independently of any infringement of a right at common law, by reason of the breach of an agreement between the parties and of an Act of Parliament; and a decision upon the right at common law seems not to have been necessary for determining the suit between the parties. These considerations greatly weaken the effect

(f) 7 Exch. 299; 21 L. J. Ex. 241.

(g) 7 Exch. 300; 21 L. J. Ex. 241.

of the case of *Dickinson v. The Grand Junction Canal Co.* as an authority against the defendant upon the point now in question ; but it is an authority in his favour to show that a right to water is not by a presumed grant from long acquiescence, but, if it exists at all, is *jure naturæ*, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground.

Prescriptive rights in natural water-courses.
Chasemore v. Richards.

“ In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff’s mill ? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff’s mill would be affected by any water percolating in and out of the defendant’s or any other land ? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant ; but how could he prevent or stop the percolation of water ? The Court of Exchequer, indeed, in *Dickinson v. The Grand Junction Canal Co.*, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturæ*. If so, *à fortiori*, the right, if it exists at all, in the case of subterranean percolating water, is *jure naturæ*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.

“ The question then is, whether the plaintiff has such a right as he claims *jure naturæ* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff’s mill. It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a

Prescriptive
rights in
natural
water-
courses.

*Chasemore v.
Richards.*

way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable ; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and, if any, which—for it is clear that no action could be maintained against them jointly ?

“ In the course of the argument one of your Lordships (Lord Brougham) adverted to the French Artesian well at the Abattoir de Grenelle, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man can safely collect the rain water as it fell into a pond ; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle ; but the question would have been the same if the distance had been ten or twenty or more miles, provided the effect had been to prevent underground percolating water from finding its way into the river, and increasing its quantity, to the detriment of the plaintiff's mill. *Such a right as that claimed by the plaintiff is so indefinite and unlimited* that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable.”

The speech of Lord Wensleydale, one of the Lords who took part in the decision of *Chasemore v. Richards*, contained the following remarks on the plaintiff's claim, as based on the possession of his mill for thirty or sixty years : “ I do not think that the principle on which prescription rests can be applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards : ‘ qui non prohibet quod prohibere potest, assentire videtur.’ But how here could he prevent it ? He could not bring an action against the adjoining proprietor ; he could not be bound to dig a deep trench in his own

land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say, that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff."

Prescriptive rights in natural water-courses.
Chasemore v. Richards.

(III.) *Miscellaneous Prescriptive Rights.*

Independently of the prescriptive rights of user and flow which are mainly called in question between riparian owners, other miscellaneous rights may be mentioned. Thus a landowner can acquire by prescription the right to go on his neighbour's land and draw water there from a spring (*h*) or from a pump (*i*), or to bring water to his house from pipes over his neighbour's land (*k*). Similarly A., a non-riparian owner, was held to have acquired by prescription the right to go on the land of B., an adjoining riparian owner, to turn the water from a natural stream into an artificial channel which passed from the stream across B.'s land to A.'s land, and to repair such channel (*l*).

Prescriptive rights, miscellaneous.

As regards discharging water upon adjoining land, it was said by Bowen, L.J., that the mere discharge of water by A., an upper proprietor, on the land of B., a lower proprietor, may easily establish a right on the part of A. to go on discharging, because so long as the discharge continues there is submission on the part of B. to proceedings which indicate a claim of right on the part of A. But it is difficult for B. to establish a right to have the flow continued, just as it would be very difficult to make out that because for twenty years my pump has dripped on to a neighbour's ground, therefore he has a right at the end of twenty years to say that my pump must go on leaking (*m*).

In the case of eaves, it has been laid down that though every one in building is bound so to construct his house as not to overhang his

(*h*) *Race v. Ward*, 1855, 4 E. & B. 702; 24 L. J. Q. B. 153; 99 R. R. 702.

(*i*) *Polden v. Bastard*, 1865, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; 147 R. R. 374.

(*k*) *Goodhart v. Hyatt*, 1883, 5 Ch. D. 182; 53 L. J. Ch. 219.

(*l*) *Beeston v. Weate*, 1856, 5 E. & B. 986; 25 L. J. Q. B. 115; 103 R. R. 853.

(*m*) *Chamber v. Hopwood*, 1886, 32

Ch. D. 508; 55 L. J. Ch. 859. See to the same effect the remarks of Lord Abinger in delivering the judgment of the Court of Exchequer in *Arkwright v. Gill*, 1839, 5 M. & W. 233; 8 L. J. (N. S.) Ex. 201; 52 R. R. 671; and of Erle, C.J., in delivering the judgment of the Court of Common Pleas in *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 352; 147 R. R. 739.

Prescriptive
rights, mis-
cellaneous.

neighbour's property, and construct his roof in such a manner as not to throw the rain water upon the neighbouring land (*n*), yet according to our law a man may acquire a right, by user, to project his wall or eaves over the boundary line of his property, or discharge the rain running from the roof of his house upon the adjoining land. The case of projecting buildings over a boundary will be dealt with in a subsequent chapter (*o*). The easement of eavesdroppings is recognized by the Court of Exchequer in *Thomas v. Thomas* (*p*). In *Pyer v. Carter* (*q*) there was an easement for the defendant to have the rain water flow from his eaves on to the plaintiff's roof, and for the plaintiff to have such water, together with the water originally falling on his own roof, carried away by a drain on the defendant's land.

There are ancient decisions recognizing similar easements in the case of a discharge of water on the neighbouring land by means of a gutter or leaden pipe (*r*). "If a man hath a sue, that is to say, a spout, above his house, by which the water used to fall from his house, and another levies a house paramount the spout, so that the water cannot fall as it was wont but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance" (*s*). Where a man who had not acquired any easement of eavesdroppings built his roof with eaves which discharged rain water by a spout into adjoining premises, whereby the reversion in such premises was damaged, the reversioner could sue (*t*). It was not necessary to prove that rain had actually fallen (*u*).

The right of eavesdroppings will not be lost by raising the house (*x*). The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land cannot by spouts discharge it upon such land in a body (*y*). For such an act trespass would not lie, but case (*z*). The flow of water for twenty years from the eaves

(*n*) Com. Dig. Action on the Case for a Nuisance, A; Dig. viii. 2, 2; Inst. II. iii. 1; Code Civil, art. 681.

(*o*) See *post*, Part III., Chap. 8.

(*p*) 1835, 2 C. M. & R. 34; 4 L. J. (N. S.) Ex. 170; 41 R. R. 678.

(*q*) 1857, 1 H. & N. 916; 26 L. J. Ex. 258.

(*r*) *Lady Browne's Case*, 3 Dyer, 319 b, cited in *Sury v. Pigott*, 1625, Palmer, 446; Com. Dig. Action on the Case for Nuisance, A; *Baten's Case*, 1738, 9 Rep. 53 b, recognized in *Fay v. Prentice*, 1845, 1 C. B. 828; 68 R. R. 823; 14 L. J. C. P. 298.

(*s*) Rolle, Abr. Nusans, G. 5, citing 18 Edw. 3, 22 b; Vin. Abr. Nuisance, G. 5.

(*t*) *Tucker v. Newman*, 1839, 11 A. & E. 40; 9 L. J. (N. S.) Q. B. 1; 52 R. R. 276.

(*u*) *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823.

(*x*) *Harvey v. Walters*, 1872, L. R. 8 C. P. 162; 42 L. J. C. P. 105.

(*y*) *Reynolds v. Clarke*, 1680, Ld. Raym. 1399.

(*z*) *Reynolds v. Clarke*, 1680, 1 Mod. 634; 8 Mod. 272; Fort. 212.

of a house will not give a right to the neighbour to insist that the house shall not be altered so as to diminish the quantity of water flowing from the roof (*a*). It may be noted here that a legal origin was presumed for the right of discharging water from a highway through a pipe on to adjoining land (*b*).

Prescriptive rights, miscellaneous.

Easements of the above nature are distinctly recognized by the civil law under the head of Urban Servitudes, "that a man shall receive upon his house or land the flumen or stillicidium of his neighbour" (*c*). "The difference," says Vinnius in his Commentary on this passage, "between the flumen and the stillicidium is this—the latter is the rain falling from the roof by drops (*guttatim et stillatim*); the flumen is when it is poured forth in a continuous stream from the lower part of the building. The servitude of receiving the stillicidium exists when my neighbour is compelled to receive upon his house the rain water running from my roof; the servitude of receiving the flumen, when he is compelled to receive the same flowing in a channel or conduit, and falling with force on his house." The civil law prohibited a man from projecting the wall or roof of his house over the boundary line of his neighbour's land, even though, by spouts or other means, the fall of water therefrom might be prevented: but a right to do so might be acquired by user; and when such projection did not, in any manner, rest upon the neighbour's soil, it was called *jus projiciendi*. Where the projection was merely intended to protect the wall, either by creating shade against the heat of the sun, or keeping off the rain, it was the *jus protegendi*. "There is this difference between the right of projecting over and that of placing upon the neighbour's property—that the projection is carried out (*provehetur*) in such a manner as not to rest anywhere (*nusquam requiesceret*), as a balcony or caves; while the thing 'placed upon' is so put as to rest on something, 'as a beam or rafter'" (*d*).

PART 3.—ARTIFICIAL WATERCOURSES.

Artificial watercourses occur frequently, especially in parts of the country where mining is carried on. A common instance of an

Artificial water-courses.

(*a*) *Wood v. Wood*, 1849, 3 Exch. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Greatrex v. Hayward*, 1853, 8 Exch. 293, 294; 22 L. J. Ex. 137; 91 R. R. 493; *Arkwright v. Gell*, 1839, 5 M. & W. 233; 8 L. J. (N. S.) Ex. 201; 52 R. R. 671.

(*b*) *A.-G. v. Copeland*, 1902, 1 K. B. 690; 71 L. J. K. B. 472.

(*c*) Ut stillicidium vel flumen recipiat quis in aedes suas, vel in aream, vel in

cloacam.—Inst. 2, 3, 1, de serv.

(*d*) Inter projectum et immissum hoc interesse, ait Labeo: quod projectum esset id, quod ita proveheretur ut nusquam requiesceret, qualia meniana, et suggerunda essent; immissum autem, quod ita fieret, ut aliquo loco requiesceret, veluti tigna, trabes, qua immitterentur.—Dig. 50, 16, 242, de v. s.

Artificial
water-
courses.

artificial watercourse is where a system of draining is created for a mine whereby the water is pumped up and flows away from the mining property through the lands of several neighbouring land-owners to join some river or lake (*e*). Another instance is where an artificial watercourse is constructed for diverting water from a natural stream for use at a mill not itself situate on the natural stream (*f*). The rights in the water of artificial watercourses have been the subject of numerous judicial decisions.

"There is no doubt," said Sir Montagu Smith in delivering the judgment of the Privy Council in *Rameshur v. Koonj* (*g*), "that the right to water flowing in a natural channel and the right to water flowing through an artificial watercourse do not rest on the same principle. In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident to his ownership. In the latter case any right to the flow of water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought or on some other legal origin." Again, it was said by Vaughan Williams, L.J., that in the case of an artificial watercourse any right to the flow of the water must be based on some grant whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement expressed or presumed from the user with the owners of the land through which the stream runs (*h*).

In ascertaining the rights in respect of an artificial watercourse, there must be taken into account, first, the character of the watercourse, whether it is temporary or permanent, secondly, the circumstances under which it was presumably created, and, thirdly, the mode in which it has in fact been used and enjoyed (*i*).

The Court may conclude that the watercourse is a permanent one (*k*), and in this case it is settled that prescriptive rights may be

Permanent
artificial
water-
courses.

(*e*) As in *Arkwright v. Gell*, 1839, 5 M. & W. 203; 8 L. J. (N. S.) Ex. 201; 52 R. R. 671; *Wood v. Waud*, 1849, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809.

(*f*) As in *Burrows v. Lang*, 1901, 2 Ch. 502; 70 L. J. Ch. 607.

(*g*) 1878, 4 App. Cas. 126 (a case in which disapproval was expressed of Lord Denman's ruling, in *Magor v. Chadwick*, 1840, 11 A. & E. 586, that the law of natural and artificial watercourses was the same).

(*h*) *Baily v. Clark*, 1902, 1 Ch. 664; 71 L. J. Ch. 396.

(*i*) Per Stirling, L.J., *Baily v. Clark*, 1902, 1 Ch. 668; 71 L. J. Ch. 396.

(*k*) As in *Baily v. Clark* (sup.); *Lewis v. Meredith*, 1913, 1 Ch. 571, 580. In *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 352; 147 R. R. 739, the Court held that the "lower launder" (one of the three streams in question in the action) was a good example of a stream artificially made but in its origin supplied by a natural spring, and subject to prescription, i.e., in effect, that this watercourse was a permanent one.

acquired (*l*). The enjoyment on which the claim to such a prescriptive right is based must be "as of right," i.e., not by leave (*m*) or under a mistake (*n*). There must also be a capable grantor of the easement (*o*).

Artificial
water-
courses.

In the case of some artificial watercourses the origin of which is unknown the proper conclusion from the user of the water and other circumstances may be that the watercourse was originally constructed upon the condition that all the riparian owners should have the same rights as they would have had if the watercourse had been a natural one (*p*). The result of such a conclusion would, it seems, be that not only could prescriptive rights be acquired, but also that the riparian owners would have in the water the ordinary rights known as natural rights.

On the other hand, the Court may conclude that the watercourse is a temporary one, constructed for a temporary purpose (*q*), as where a watercourse was constructed and maintained for the purpose of a mill (*r*), or for draining a mine. The rules applicable to cases of this nature were discussed by Lord Abinger in delivering the judgment of the Court of Exchequer in *Arkwright v. Gell* (*s*). That case turned upon the right of the occupiers of mills situate on a stream which drained a mine to compel the mine-owners to continue such discharge. And the Court held that no such right existed. The judgment of Lord Abinger contained the following remarks:—

Temporary
artificial
water-
courses.

Arkwright
v. Gell.

"The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which flowing in its natural course the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill* (*t*) and in other cases; this was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained

(*l*) *Ivimey v. Stocker*, 1866, 1 Ch. 406, 409; 35 L. J. Ch. 467; *Rameshur v. Koonj*, 1878, 4 App. Cas. 128; *Blackburne v. Somers*, 1879, 5 L. R. Ir. 1; *Powell v. Butler*, 1871, 1 R. 5 C. L. 309.

(*m*) *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 352; 147 R. R. 739.

(*n*) *Chamber v. Hopwood*, 1886, 32 Ch. D. 549; 55 L. J. Ch. 859.

(*o*) *McEvoy v. G. N. R.*, 1900, 2 I. R. 325.

(*p*) *Baily v. Clark*, 1902, 1 Ch. 665; 71 L. J. Ch. 396; *Whitmores v. Stamford*, 1909, 1 Ch. 427, 439; 78 L. J. Ch.

144; *Sutcliffe v. Booth*, 1863, 32 L. J. Q. B. 136; 139 R. R. 744; *Roberts v. Richards*, 1881, 50 L. J. Ch. 297. In *McCartney v. Londonderry Co.*, the stream was in fact artificial, but the case was argued on the hypothesis that it was a natural one: see 1904, A. C. 303; 73 L. J. P. C. 73.

(*q*) As in *Hanna v. Pollock*, 1900, 2 I. R. 664.

(*r*) *Burrows v. Lang*, 1901, 2 Ch. 502; 70 L. J. Ch. 607.

(*s*) 1839, 5 M. & W. 203; 8 L. J. N. S. 201; 52 R. R. 671.

(*t*) 1833, 5 B. & Ad. 1; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354.

Artificial
water-
courses.

*Arkwright
v. Gell.*

by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted. . . . What, then, is the species of right or interest which the proprietor of the surface, where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the recent statute 2 & 3 Will. 4, c. 71 ? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity ; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests ; and what is there to raise an inference of such an intention ? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant ; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely,—a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity as a matter of right.

“ Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such a user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the landowner ? Or if the water from the spout of the eaves of a row of houses was to flow into an

adjoining yard and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant he would, by twenty years' user, have acquired the like right as against such owner; but the user even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

Artificial
water-
courses,
Arkwright
v. Gell.

"It remains to be considered whether the statute 2 & 3 Will. 4, c. 71, gives to Mr. Arkwright and those who claim under him any such right, and we are clearly of opinion that it does not. The whole purview of the Act shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods '*without interruption*,' and therefore necessarily imports such a user as could be *interrupted* by some one 'capable of resisting the claim'; and it also requires it to be 'of right.' But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode: and as against them it was not 'of right'; they had no interest to prevent it: and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water so long as their mines were freed from it."

After *Arkwright v. Gell*, where the rights of lower riparian owners when asserted as against the creator of an artificial stream were discussed, there came before the same Court *Wood v. Waul* (u), where the question arose as to the same rights when asserted as against upper riparian owners. In the last-mentioned case water from the working of a colliery had for more than twenty years flowed through two artificial channels called the Bowling Sough

(u) 1849, 3 Exch. 748; 77 R. R. 809.

Artificial
water-
courses.
Wood v.
Waud.

and Low Moor Sough. The first passed directly through the plaintiffs' land. The second passed into a natural stream, which, so augmented, passed through the plaintiffs' land. The defendant, having works on each channel above the points where they respectively arrived at the plaintiffs' land and at the Bowling Sough, diverted the water of each. The channels were subterranean, but the Court determined the question as it would have stood if they had been surface streams. The judgment of the Court, which was delivered by Pollock, C.B., contained the following passages:—

“ This question is not with respect to the rights of the plaintiffs as against the owners of the collieries which the soughs relieve from water, but as to the rights of the plaintiffs and defendants inter se ; and it will be better to consider, in the first place, how they would stand if the streams were not underground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors as against them, in consequence of their acquiescence for twenty years by virtue of the presumption of a grant, or of Lord Tenterden's Act (2 & 3 Will. 4, c. 71), there would be no difficulty as to the right of the riparian proprietors against each other or against other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden's Act. This Court, as then constituted, much considered that subject in the case of *Arkwright v. Gell*. We have again considered it, and are satisfied that the principles laid down as governing that case are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character ; and where the interruption was by the party who stood in the situation of the grantor. . . .

“ We entirely concur with Lord Denman, C.J., in *Magor v. Chadwick (v)*, that ‘ the proposition that a watercourse, of whatever antiquity and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible ’ ; but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same whether they be natural or artificial, cannot possibly be

sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the water-course, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created (*x*). The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation.

Artificial
water-
courses.
Wood v.
Waud.

“The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land (*x*). The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. If, then, this had been a question between the plaintiffs and the colliery owners, it seems to us that the plaintiffs could not have maintained an action for omitting to pump water by machinery. Nor, if the colliery proprietors had chosen to pump out the water from the pit, from whence the stream flowed continuously, and caused what is termed the natural flow to cease, could the plaintiffs, in our opinion, have sued them for so doing. But this case is different. The water has been permitted to flow in an artificial channel by the colliery owners, and for sixty years. And the question is one of more difficulty, whether the plaintiffs can sue another person, a proprietor and occupier of the land above and through which the sough passes not claiming under or authorized by them, for diverting the water.

“The case of the Bowling Sough differs from the Low Moor Sough in this, that the plaintiffs in 1838 used the water of the Bowling Sough, where it passes through their land, by making a communication to their reservoir, for working the mill. Have the plaintiffs a right to the water of this sough? It appears to us to be clear that, as they have a right to the Bowling Beck (the natural

(*x*) *Baily & Co. v. Clark, Son and Morland*, 1902, 1 Ch. 649; 71 L. J. Ch. 396. See as to the case of a drowned mine, and the temporary support occasioned by the water, the observations of Wood, V.-C., in *N. E. R. v.*

Elliott, 1860, 29 L. J. 812; 1 J. & H. 145; 128 R. R. 313.

(*x*) See *Greatrex v. Haywood*, 1853, 8 Exch. 291; 22 L. J. Ex. 137; 91 R. R. 493; *Hanna v. Pollock*, 1900, 2 I. R. 664.

Artificial
water-
courses.

Wood v.
Waud.

stream) as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part (y), whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works. And if the proprietors of the drained lands or of the colliery works augmented the stream by pouring water into it, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it.

“But the question arises with respect to an artificial stream not yet united to the natural one.

“The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the waters from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land; he has no right to compel the owners above to permit the water to flow through their lands for his benefit; and, consequently, he has no right of action if they refuse to do so.

“If they pollute the water, so as to be injurious to the tenant below, the case would be different.

“We think, therefore, that the plaintiffs have no right of action for the diversion of that water. The question as to the Low Moor Sough is less favourable to the plaintiffs, for this sough does not pass through their land at all.

“We are of opinion, that, if the plaintiffs would not be entitled to the water of the soughs if above ground, their being below ground in this case would probably make no difference. It does not certainly make a difference in favour of the plaintiffs” (z).

Of *Wood v. Waud* (a) it was said later by Blackburn, J., that this was in effect a decision that an active enjoyment in fact for more

(y) See *Dudden v. Clutton Union*, 1857, 1 H. & N. 627; 26 L. J. Ex. 146; 108 R. R. 752.

(z) Cf. *Wardle v. Brocklehurst*, 1859, 1 E. & E. 1053, at p. 1060; 29 L. J. Q. B. 40; 117 R. R. 576; *Staffordshire*

Co. v. Birmingham Co., 1866, L. R. 1 H. L. 254; 35 L. J. Ch. 25; *Brymbo Water Co. v. Lester's Lime Co.*, 1894, 8 R. 329.

(a) Sup.

than the statutory period was not an enjoyment as of right, if during the period it was known that it was only permitted so long as some particular purpose was served. The nature of the sough showed that though the water had in fact flowed for sixty years, yet from the beginning it was only intended to flow so long as the coal owners did not think fit otherwise to drain their mine, and so was precarious (*b*).

Artificial
water-
course.
Wood v.
Waud.

In accordance with *Wood v. Waud*, it was held in *Greatrex v. Hayward* (*c*), that the flow of water for twenty years from a drain made for agricultural improvements did not give to the person through whose land it flowed a right to the continuance of the flow, so as to preclude the proprietor of the land drained from altering his drains for improvement and so cutting off the supply.

Greatrex v.
Hayward.

It follows from the above authorities that where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can by prescription be acquired either against the creator of the stream (*d*) or against upper riparian owners through whose land the stream passes (*e*).

As regards the question when a watercourse should be held to have been constructed for a temporary purpose within the principle of the decision of *Arkwright v. Gell* (*f*), it was said by Farwell, J., that the meaning of temporary purpose is not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may in the reasonable contemplation of the parties come to an end (*g*).

Again, it seems that it is more difficult to presume an agreement as to enjoyment when a watercourse is constructed entirely over the land of the creator than in the case of water pumped over the land of a neighbour (*h*).

PART 4.—PURITY AND POLLUTION.

Rights of Licensees of Riparian Owners.

Every riparian owner on the banks of a natural stream is entitled as a natural right to have the stream flow past his land without sensible alteration in its character or quality (*i*). He is accordingly

Purity and
pollution.

(*b*) *Mason v. Shrewsbury Co.*, 1871, L. R. 6 Q. B. 584; 40 L. J. Q. B. 293.

(*c*) 1853, 8 Exch. 291; 22 L. J. Ex. 137; 91 R. R. 493.

(*d*) See *Arkwright v. Gell*, *sup.*; *Burrows v. Lang*, *sup.*

(*e*) *Wood v. Waud*, *sup.*; *Mason v. Shrewsbury Co.*, *sup.*

(*f*) 1839, 5 M. & W. 203; 8 L. J. (N. S.) Ex. 201; 52 R. R. 671.

(*g*) *Burrows v. Lang*, 1901, 2 Ch. 508; 70 L. J. Ch. 607.

(*h*) *Ibid.*; see *McEvoy v. G. N. R.*, 1900, 2 L. R. 333.

(*i*) *Young v. Bankier*, 1893, A. C. 698.

Purity and
pollution.

entitled to insist that the water shall not be polluted by the refuse of a factory or the sewage of a town (*k*); that very soft water shall not be made very hard water (*l*); that the water shall not be raised in temperature (*m*). The right arises in respect of the ownership of the bank, independently of the ownership of the bed of the stream (*n*). The natural right to purity extends to underground water (*o*). Further, as regards underground water, we have seen above (*p*) that every man has the right to appropriate all underground water percolating through an undefined channel on his land. Again, it is settled that *primâ facie* no man has a right to use his land in such a way as to be a nuisance to his neighbour (*q*). Accordingly, if a man puts poison or filth on his land, with the result that water percolating underground from his own to his neighbour's land is polluted, the neighbour has a right of action (*r*).

A riparian owner can maintain an action to restrain pollution without proving that there has been actual damage (*s*). The fact that the stream has already been polluted by A. is not a defence to an action to restrain pollution by B. (*t*). Again, if the acts of several persons which independently would not produce pollution result in producing pollution when combined, each of them may be restrained (*u*). The grantee of a right of fishing can obtain an injunction to restrain pollution (*x*).

Statutory
prevention
of pollution.

To prevent the pollution of water numerous statutes have from time to time been passed. Amongst others the following may be mentioned here, viz.:—The Rivers Pollution Prevention Acts, 1876 and 1893 (*y*); the Public Health Acts, 1875 and 1890 (*z*); the Public Health (London) Act, 1891 (*a*); and the Thames Conservancy Act, 1894 (*b*).

As in the case of the natural rights of user and flow, so in the case of the natural right of purity, rights may be acquired by prescription which interfere with the natural right. The 2nd

(*k*) *Crossley v. Lightowler*, 1867, 2 Ch. 478; 36 L. J. Ch. 584; *Jones v. Llanwrst*, 1911, 1 Ch. 402; 80 L. J. Ch. 145. See *Magor v. Chadwick*, 1840, 11 A. & E. 586; 9 L. J. Q. B. 159.

(*l*) *Young v. Bankier*, sup.

(*m*) See *Tipping v. Eckersley*, 1855, 2 K. & J. 264; 110 R. R. 216.

(*n*) *Jones v. Llanwrst*, sup.

(*o*) *Hodgkinson v. Ennor*, 1863, 4 B. & S. 229; 32 L. J. Q. B. 231; 129 R. R. 728.

(*p*) Ante, p. 255.

(*q*) *Ballard v. Tomlinson*, 1885, 29 Ch. D. 126; 54 L. J. Ch. 454.

(*r*) *Ibid.*; *Turner v. Mirfield*, 1865,

34 Beav. 390; 145 R. R. 571.

(*s*) *Jones v. Llanwrst*, 1911, 1 Ch. 402; 80 L. J. Ch. 145.

(*t*) *Crossley v. Lightowler*, 1867, 2 Ch. 478; 36 L. J. Ch. 584.

(*u*) *Blair v. Deakin*, 1887, 57 L. T. 522.

(*x*) *Fitzgerald v. Firbank*, 1887, 2 Ch. 96; 66 L. J. Ch. 529.

(*y*) 39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31.

(*z*) 38 & 39 Vict. c. 55, ss. 17, 68, 69, 70; 53 & 54 Vict. c. 59, s. 47.

(*a*) 54 & 55 Vict. c. 76, ss. 52, 54.

(*b*) 57 & 58 Vict. c. clxxxvii., s. 91; Port of London Act, 1908, s. 8 (7).

section of the Prescription Act refers to claims which may be lawfully made by custom, prescription, or grant to any watercourse or the use of any water. A claim to a watercourse within the section includes a claim to send through another's watercourse either polluted water (*c*) or sand and rubble (*d*). And generally it is clear that a right may be acquired by prescription to pollute a stream (*c*). But such a right can only be acquired by the continuance of perceptible injury for twenty years (*f*). The right may be binding on a local authority (*g*).

Purity and
pollution.

There can, however, be no prescriptive right to justify a public nuisance (*h*), nor would a prescriptive right to pollute water be any defence to proceedings under the Rivers Pollution Act, 1876 (*i*).

As regards artificial watercourses, we have seen that in some cases the proper conclusion may be that the watercourse was originally constructed upon the condition that all the riparian owners should have the same rights as they would have had if the watercourse had been a natural one (*k*). In these cases it seems that the riparian owners would have the natural right of purity. In other cases the proper conclusion may be that the watercourse was a temporary one constructed for a temporary purpose (*l*). In these cases it seems that, apart from prescription, appropriation of the water by a person entitled to appropriate it gives such a person the right to insist that the water shall not be polluted to his injury (*m*).

In *Whaley v. Laing* (*n*) the plaintiff, by permission of a canal company, made a communication from the canal to his own premises, by which water was brought on to them, with which water he fed his boilers; and the defendant fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it his boilers were injured. The defendant had

(*c*) *Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 4 R. R. 265.

(*d*) *Carlyon v. Lovering*, 1857, 1 H. & N. 784; 26 L. J. Ex. 251; 108 R. R. 822. Compare *Murgatroyd v. Robinson*, 1857, 7 E. & B. 391; 26 L. J. Q. B. 233; 110 R. R. 642.

(*e*) *Baxendale v. McMurray*, 1867, 2 Ch. 790; *McIntyre v. McGavin*, 1893, A. C. 274 (refuse from factory); *A.-G. v. Dorking*, 1882, 20 Ch. D. 595; 51 L. J. Ch. 685; *Brown v. Dunstable*, 1899, 2 Ch. 378; 58 L. J. Ch. 498 (sewage).

(*f*) *Goldsmid v. Tunbridge Wells*, 1866, 1 Ch. 349; 35 L. J. Ch. 382.

(*g*) *Harrington v. Derby*, 1905, 1 Ch. 219; 74 L. J. Ch. 219.


(*h*) *A.-G. v. Barnsley*, 1874, W. N. 37; *Butterworth v. West Riding*, 1909, A. C. 57.

(*i*) *Butterworth v. West Riding*, 1909, A. C. 54; *West Riding v. Linthwaite*, 1914, 2 K. B. 16.

(*k*) Ante, p. 273.

(*l*) Ante, p. 273.

(*m*) *Whaley v. Laing*, 1857, 2 H. & N. 476; 26 L. J. Ex. 327; 115 R. R. 645; 1858, 3 H. & N. 675, 901.

(*n*) 1857, 2 H. & N. 476; 1858, 3 H. & N. 675, 901; 26 L. J. Ex. 327; 115 R. R. 645. 

Purity and
pollution.

no permission from the canal owners to do what he did. The Court of Exchequer gave judgment for the plaintiff, on the ground that, as the defendant was the cause of dirty water flowing on to the plaintiff's premises without any right to do so, he was liable to an action. The Court expressly abstained from giving any opinion upon the question, whether an action would have been maintainable against the defendant if the defendant had diverted the water, or if the plaintiff had been obliged to go to the canal and fetch the water instead of its flowing into his premises. In the Exchequer Chamber the judgment was reversed, but for reasons involving no dissent from the ground on which the judgment in the Court below was based. But the judgments in the Exchequer Chamber show that it was considered very doubtful whether a person, having a mere permission from a riparian owner to take water out of a stream, can maintain an action against a wrongdoer for diverting or fouling the stream higher up.

Licence to
use water.
*Stockport
Waterworks
Co. v. Potter.*

The question as to the purity rights of a licensee from a riparian owner was subsequently raised in the case of a natural stream (o). The Stockport Waterworks Company sued Potter for fouling the water of the Mersey, coming to their works through a tunnel which they had made under a grant from a riparian proprietor. The Court of Exchequer held that they were not entitled to sue. The reason of the decision is given in the judgment of Pollock, C.B., and Channell, B. (in which Wilde, B., concurred). They say: "It is difficult to perceive any possible legal foundation for a right to have the river kept pure in a person situate as this company is. There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have them against the grantor (p), but not so as to sue other persons in his own

(o) *Stockport Waterworks Co. v. Potter*, 1864, 3 H. & C. 300; 140 R. R. 453; 31 L. J. (N. S.) Ex. 9.

(p) *Hamelin v. Bannerman*, 1895, A. C. 237; 64 L. J. P. C. 66.

name for the infringement of them. The case of *Hill v. Tupper* (q), recently decided in this court, is an authority for the proposition that a person cannot create by grant new rights of property, so as to give the grantee a right of suing in his own name for an interruption of the right by a third party.”

Purity and pollution.

The last-mentioned case has been approved in the Court of Appeal and treated as expressly deciding that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and that any user of the stream by a non-riparian proprietor, even under a grant from a riparian proprietor, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors (r).

Rights of licensees of riparian owners.

In *McCartney v. Londonderry* it was held that A., an upper riparian owner on a natural stream, had no right as between himself and B., a lower riparian owner, to divert the water to a place outside A.'s tenement and there consume it for purposes unconnected with the tenement. And this conclusion the House of Lords arrived at although the damage suffered or likely to be suffered by B. was small (s).

On the authority of *McCartney v. Londonderry Co.* (t) it was submitted in the last edition of this treatise that a lower riparian owner, even though his flow of water was not diminished or injured in quality (provided that the facts were not such as to bring the case within the maxim “de minimis non curat lex”), could prevent an upper riparian owner from permitting a third person to use the stream. Such user would, it was submitted, be foreign to or unconnected with the tenement of the upper riparian owner, and the permission given would therefore be in excess of the rights of such owner.

In *Kensil v. G. E. R.* a person who held a licence from an upper riparian owner on a natural stream took water from the stream, and after using it for purposes unconnected with the riparian owner's tenement returned it to the stream unaltered in quality or quantity. A lower riparian owner having brought an action to restrain this user, the Court of Appeal refused an injunction. The grounds of their decision were thus stated by Cotton, L.J.: “The plaintiffs

(q) 1863, 2 H. & C. 121; 32 L. J. Ex. 217; 133 R. R. 605.

(r) *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 162; 52 L. J. Q. B. 445.

(s) See 1904, A. C. 301, 310, 313; 73 L. J. P. C. 73. See also the words of Bowen, L.J.: “The only legitimate user by a riparian proprietor of the

water (other than such rights as he may have acquired by prescription) is for purposes connected with his ordinary occupation of the land upon the bank” (*Ormerod v. Todmorden*, 1883, 11 Q. B. D. 172; 52 L. J. Q. B. 445).

(t) 1904, A. C. 301; 73 L. J. P. C. 73.

Rights of
licensees of
riparian
owners.

say, and they are right, that a riparian owner is in this position, that he can maintain an action for interference with his right, even although he does not show that at the time he has suffered any actual damage and loss. But then we must consider what the right of a riparian owner is as regards the lower riparian owners. It is this, that he has a right to take and use the water as it runs past him for all reasonable purposes. . . . Then, as against the upper proprietors, he has this right, he is entitled to have the flow of the water in the natural bed of the river coming down to him unaltered in quality and quantity, subject only to the right of the upper proprietors, such as he has against the proprietors below him, to take the water for reasonable purposes. Then he has this right, that where the stream comes opposite to or through his land it shall come in its ordinary and accustomed channel. Now has that been interfered with? I am of opinion it has not. The quantity and quality of the stream when it comes into the plaintiff's land is the same as it always was." And Lindley, L.J., pointed out that, so long as the defendant did only what he was then doing, there was no possibility of injury (*u*).

The theories applied by the House of Lords in *McCartney v. Londonderry* and by the Court of Appeal in *Kensit v. G. E. R.* seem at the first sight inconsistent. Lord Lindley was a party to both decisions, and they are to be reconciled (if at all) in the manner pointed out by him in his judgment in the House of Lords, where he stated that the ratio decidendi in *Kensit v. G. E. R.* was that what was there complained of never could grow into a prescriptive title, inasmuch as all the water taken was returned unaltered in quantity or quality (*x*).

PART 5.—ACQUISITION OF WATER RIGHTS.

Acquisition
of water
rights.
Grant.

Water rights may be acquired by express grant. As to the construction of an express grant, it has been laid down that the grant of a "watercourse" may mean (1) the right to the running water; or (2) the drain which contains the water; or (3) the land over which the water flows (*y*). But the natural meaning of "watercourse" seems to be the channel, whether natural or artificial, through which a stream flows (*z*). The reservation of a right to make a watercourse

(*u*) 1884, 27 Ch. D. 122, 130, 135; 54 L. J. Ch. 19.

(*x*) 1904, A. C. 313; 73 L. J. P. C. 73.

(*y*) *Taylor v. St. Helens*, 1877, 6 Ch. D. 264; 46 L. J. Ch. 857 (where the effect of the grant of an artificial

watercourse was considered).

(*z*) *Remfry v. Natal*, 1906, A. C. 560; *Anderson v. Cleland*, 1910, 2 I. R. 377; but see *Doe v. Williams*, 1848, 11 Q. B. 700; 17 L. J. Q. B. 154; 75 R. R. 591.

included the right to divert water and to use the water diverted (*a*). Acquisition of water rights. A "spring of water" means a natural source of water of a definite and well-marked extent (*b*). A "stream" is water which runs in a defined course, so as to be capable of diversion (*c*). The same word was held not to include either the spring or water soaking through marshy ground (*d*). In *Northam v. Hurley* (*e*) it was held, on the construction of the grant of a watercourse from the land of the grantor to the land of the grantee, that the grantor could not alter the channel on his own land although no damage had occurred to the grantee. The effect of special words in an express grant or reservation of water was also considered in *Rawstron v. Taylor* (*f*), *Lee v. Stevenson* (*g*), and *Finlinson v. Porter* (*h*). A grant (in pursuance of a statute) of the exclusive right of drainage through a watercourse gave the grantee, not merely an easement, but (for the purpose of rating) possession of the watercourse (*i*).

A grant of all streams of water that might be found in land, when at the time of the grant there were one stream and several wells, was held to include the underground water in the land; the grantor could not, nor could any one claiming under him, do anything the effect of which could be to drain such underground water from the land (*k*). But a grant of an artificial watercourse as shown in a plan, with the stream and springs flowing into or feeding the same, was held to be a grant of the artificial channel and of the definite springs and streams feeding it, and of such other water as should run into and down the channel as it stood, and not to justify the grantees in enlarging the channel so as to carry off more water (*l*).

Water rights may also be acquired by prescription, as to which see ante, pp. 183 et seq. Prescription.

Again, they may be acquired by custom (*m*). Custom.

(*a*) *Remfry v. Natal*, 1896, A. C. 558; 65 L. J. P. C. 72.

(*b*) *Taylor v. St. Helens*, sup.

(*c*) *Ibid.*

(*d*) *McNab v. Robertson*, 1897, A. C. 129; 66 L. J. P. C. 27.

(*e*) 1853, 1 El. & Bl. 665; 22 L. J. Q. B. 183; 93 R. R. 329.

(*f*) 1855, 11 Exch. 369; 25 L. J. Ex. 33; 105 R. R. 567.

(*g*) 1858, 27 L. J. Q. B. 263.

(*h*) 1875, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56.

(*i*) *Holywell v. Halkyn*, 1895, A. C. 117; 64 L. J. M. C. 113.

(*k*) *Whithead v. Parke*, 1858, 2

H. & N. 870; 27 L. J. Ex. 169; 115 R. R. 863.

(*l*) *Taylor v. St. Helens*, 1877, 6 Ch. D. 264; 46 L. J. Ch. 857; *McNab v. Robertson*, 1897, A. C. 129; 66 L. J. P. C. 27.

(*m*) *Bastard v. Smith*, 1837, 2 Mood. & R. 129; 8 L. J. (N. S.) Q. B. 244; 50 R. R. 387; *Gaved v. Martyn*, 1865, 19 C. B. N. S. 732; 34 L. J. C. P. 352; 147 R. R. 739 (customary right to divert); *Carlyon v. Lovering*, 1857, 1 H. & N. 784 (customary right to pollute); *Harrop v. Hirst*, 1868, L. R. 4 Ex. 43 (customary right to use of water).

PART 6.—MISCELLANEOUS.

Miscellaneous rights of riparian owners.

Subsequent chapters will deal with the limits of the user of water rights (*n*); the effect of an alteration in the dominant tenement (*o*); the extinction of water rights (*p*); also the remedies for their infringement (*q*).

Right of riparian owner to place erections on bed.

It may be useful to add here some further decisions as to the rights of riparian owners. Thus it has been laid down that the owner of both banks of a non-tidal river may build on the bed provided he do not alter the natural flow of the water above or below his property (*r*). Again, the owner of one bank only cannot as against the opposite owner build on his own moiety of the bed in such a manner as to interfere with the natural flow of the stream; and was restrained, although there was no proof that damage had been sustained or was likely to be sustained (*s*). This principle has been extended to tidal navigable rivers (*t*).

To divert flood water.

As regards the rights of erection possessed by a riparian owner generally, it seems that he may erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching (*u*), or place an erection on his own bank to protect it (*v*). So it has been laid down that a riparian owner has a right to raise the banks upon his own land so as to prevent the water from overflowing his land, with this restriction, that he does not occasion injury to the property of others (*x*). If an extraordinary flood is seen to be coming on land, the owner may protect his land from it without being responsible for consequences, although his neighbour may be injured (*y*). But if the flood has already come, the owner must not, for the purpose of getting rid of the mischief, injure his neighbour (*z*).

(*n*) Part IV., Chap. 3, post.

(*o*) Ibid.

(*p*) Part V., post.

(*q*) Part VI., post.

(*r*) *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839; see *Greyvensteyn v. Hattingh*, 1911, A. C. 359; 80 L. J. P. C. 158.

(*s*) *Bickett v. Morris*, 1866, L. R. 1 H. L. Sc. 47.

(*t*) *A.-G. v. Lonsdale*, 1868, 7 Eq. 377; 38 L. J. Ch. 335; *A.-G. v. Terry*, 1874, 9 Ch. 423; see *Exeter v. Devon*, 1870, 10 Eq. 232.

(*u*) *Withers v. Purchase*, 1889, 60 L. T. 821; compare *A.-G. v. Wright*, 1897, 2 Q. B. 318; 66 L. J. Q. B. 834.

(*v*) *Ridge v. Midland Co.*, 1888, 53 J. P. 55; see *Bickett v. Morris*, sup.

(*x*) *R. v. Trafford*, 1831, 1 B. & Ad. 874; 8 Bing. 204; 2 Cr. & Jerv. 265; 9 L. J. K. B. 72—129; 9 L. J. M. C. 66; 34 R. R. 680; *Menzies v. Breadalbane*, 1828, 3 Bligh, N. S. 414, 418; 32 R. R. 103; *A.-G. v. Lonsdale*, sup. Compare the easement of opening locks acquired by a corporation for the protection of their land: *Simpson v. Godmanchester*, 1897, A. C. 696.

(*y*) *Nield v. L. & N. W. R.*, 1874, L. R. 10 Ex. 4; 44 L. J. (N. S.) Ex. 15; see *Whalley v. Lancashire R.*, 1884, 13 Q. B. D. 136, 140; 53 L. J. Q. B. 285; *Masey v. G. N. R.*, 1912, 106 L. T. 429. Compare the similar right on the sea-shore: *R. v. Pagham*, 1823, 8 B. & C. 345; 6 L. J. K. B. 338; 32 R. R. 406.

(*z*) *Whalley v. Lancashire R.*, sup.

It may also be useful to notice some decisions as to navigable rivers. In the case of these rivers the public have a right to use the river for navigation similar to the right which they have to pass along a public highway through private land (*a*). And an artificial navigable river may be dedicated as a public highway (*b*). But the analogy between a navigable river and a public highway is not complete (*c*). In the case of the soil of navigable rivers there may be also public rights incidental to the right of navigation, such as fixing moorings and anchoring (*d*). As regards the right of access, it is settled that in general a riparian owner on a navigable river has, subject to the public right of navigation, the same right of access to the river as such an owner has on a non-navigable river (*e*).

Navigable
rivers.

(*a*) *Orr-Ewing v. Colpukoun*, 1877, 2 App. Cas. 839; see *Original Hartlepool Co. v. Gibb*, 1877, 5 Ch. D. 713; 46 L. J. Ch. 311.

(*b*) *A.-G. v. Simpson*, 1901, 2 Ch. 716; 70 L. J. Ch. 828; see *Simpson v. A.-G.*, 1904, A. C. 494.

(*c*) *A.-G. v. Simpson*, 1901, 2 Ch. 687; 1904, A. C. 509.

(*d*) *A.-G. v. Wright*, 1897, 2 Q. B.

318; 66 L. J. Q. B. 834; *Dennaby v. Anson*, 1911, 1 K. B. 171; 80 L. J. K. B. 320.

(*e*) *Lyon v. Fishmongers' Co.*, 1876, 1 App. Cas. 662; 46 L. J. Ch. 68; *North Shore Co. v. Pion*, 1889, 14 App. Cas. 612; 59 L. J. P. C. 25; *Hindson v. Ashby*, 1896, 2 Ch. 30; 65 L. J. Ch. 515.

CHAPTER II.

RIGHT TO LIGHT.

Lateral passage of light not of common right.

THE right to flowing water in a natural stream, it has already been shown, is an ordinary right of property requiring no length of time to fortify it. The right to light seems to depend, however, upon very different grounds. The passage of light over lands unincumbered by buildings must necessarily have existed from time immemorial : but the use of the light so passing, by means of windows in a house or otherwise, confers no right unless it has been continued during twenty years. The natural rights of the owner of property in this respect seem to be defined by the legal maxim, “*Cujus est solum ejus est usque ad cœlum et ad inferos*” ; and the passage of light over adjoining lands affords per se no evidence of the enlargement of such right by an easement.

Acquisition of easement of light.

The right to the reception of light in a lateral direction without obstruction is an easement. The strict right of property entitles the owner to so much light only as falls perpendicularly on his land. He may build to the very extremity of his own land, and no action can be maintained against him for disturbing his neighbour's privacy by opening windows which overlook the adjoining property (*a*). But it is competent to such neighbour to obstruct the windows so opened by building against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement (*b*) ; if, however, that period is once suffered to elapse, his long acquiescence becomes evidence, as in the case of other easements, of a title, by the assent of the party whose land is subject to it (*c*).

(*a*) *Chandler v. Thompson*, 1811, 3 Camp. 81 ; 13 R. R. 756.

(*b*) See per Littledale, J., in *Moore v. Rawson*, 1824, 3 B. & C. 340 ; 3 L. J. K. B. 32 ; 27 R. R. 375 ; and, as showing that a railway company has in this respect the same rights as an individual, see *Bonner v. G. W. R.*, 1883, 24 Ch. D. 1 ; *Foster v. L. C. & D. R.*, 1895, 1 Q. B. 711 ; 64 L. J. Q. B. 65.

(*c*) Some expressions are to be found in the books implying doubts as to the appropriateness of the term “ease-

ment” in this case, and of the soundness of the theory that the origin of the right to light at the common law was either an implied covenant or grant. There appears to be no ground for such doubts. The implied grant is not of *the light*, but of the right to the negative servitude, binding the owner of the adjoining land not to build on it ; or, as was said by Cresswell, J., 7 C. B. 566, “the land becomes subject to a right analogous to what, in the Roman law, was called a servitude,” i.e., a servitude

In *Penwarden v. Ching (d)*, a case decided before the Prescription Act, a claim by the defendant to have light pass through a window which had been made twenty-one years before action was resisted by the plaintiff on the ground that the window was shown not to be an ancient window. Tindal, C.J. : "The question is, not whether the window is what is strictly called ancient, but whether it is such as the law in indulgence to rights has in modern times so called, and to which the defendant has a right."

The right to light can be claimed by prescription at common law or by lost grant (both of which methods existed before the Prescription Act, 1832), as well as under the Act (*e*). Where light is claimed in either of the two first-mentioned methods a grant must be presumed (*f*) and the enjoyment must be as of right (*g*); but where light is claimed under s. 3 of the Prescription Act, 1832, it is not necessary to presume a grant (*h*), or that the actual enjoyment should be as of right (*i*).

The mode in which an easement may be acquired, namely by grant, express or implied, or by prescription, has been fully considered in the second part of this work; but certain questions, peculiar to the easement of light, should be referred to in this place.

In the first place, it is clear that the right to light cannot be acquired by user in respect of vacant land (*k*).

Where the right to light is claimed by prescription at common law or by lost grant, the last mentioned rule is laid down in the

"*ne facias*"; and the easement so created affects the adjoining land by burdening it with a negative servitude "*ne facias*." Further, a number of authorities appear to treat the right as originating in covenant or grant; but the point has become of little importance, as, under the 2 & 3 Will. 4, c. 71, s. 3, twenty years' actual enjoyment of light without interruption confers an absolute right, unless the enjoyment has been had under a written consent or agreement given for the purpose; and most cases fall within the statute. See per Lord Mansfield in *Darwin v. Upton*, 1786, 2 Wms. Saund. 506; Littledale, J., in *Moore v. Rawson*, 1824, 3 B. & C. 340; 31 L. J. K. B. 32; 27 R. R. 475; Parke, B., in *Harbidge v. Warwick*, 1849, 3 Exch. 556; 18 L. J. Ex. 245; 77 R. R. 725; Watson, B., in *Roubootham v. Wilson*, 1857, 8 E. & B. 143; 27 L. J. (N. S.) Q. B. 61; Brett, L.J., in *Angus v. Dalton*, 1878, 4 Q. B. D. 196; 48 L. J. Q. B. 225; Fry, J., in *Dalton v. Angus*, 1881, 6 App. Cas. 771; 50 L. J. Q. B. 689;

and Bowen and Fry, L.J.J., in *Scott v. Pape*, 1886, 31 Ch. D. 570, 575; 55 L. J. Ch. 426.

(*d*) 1829, Moo. & Mal. 400.

(*e*) *Aynsley v. Glover*, 1874, 10 Ch. 283; 44 L. J. (N. S.) Ch. 523; *Gardner v. Hodgson's Co.*, 1903, A. C. 238; 72 L. J. Ch. 558.

(*f*) 1903, A. C. 239; 72 L. J. Ch. 558.

(*g*) *Colls v. Home Stores*, 1904, A. C. 206; 73 L. J. Ch. 484.

(*h*) *Tapling v. Jones*, 1865, 11 H. L. C. 290; 30 L. J. C. P. 342; 145 R. R. 192; *Jordeson v. Sutton*, 1898, 2 Ch. 626; 67 L. J. Ch. 666.

(*i*) *Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 484.

(*k*) Compare *Griffith v. Clay*, 1912, 1 Ch. 291, where the owner of a house and vacant land adjoining sued to restrain obstruction of the lights of the house, and recovered as damages the diminution in value of the whole of his premises considered as one building site.

Presumption of grant.

User in respect of vacant land.

Not sufficient ground for claim to light by common law prescription or lost grant,

reporter's marginal note to *Roberts v. Macord* (*l*), which appears to be sound. The note runs as follows :—"The use of an open space of ground in a particular way requiring light and air for twenty years does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air" (*n*).

or for claim
under
statute.

Where the right to light is claimed under the Prescription Act (*n*) the enjoyment must have been had to and for a "building," in which there must be some aperture. This aperture may be a skylight (*o*), or an arch (*p*). The aperture defines the free area (*q*). But in the case of an alteration of the dominant tenement, the preservation of the right to light depends, not on identity of aperture, but upon identity of light (*r*).

Actual user
by building
need not be
shown.

For the purpose of a claim under the Act no actual enjoyment (in the sense of user and occupation) of the light need be shown; it is sufficient that the aperture existed, and that the light might have been used at any time (*s*).

Extent of
right
acquired by
user.

Considerable doubt has existed as to the extent of the right acquired by enjoyment—viz., whether the access of light through a window for the necessary period entitles the owner to object to *any* substantial diminution of the light which has been accustomed to pass through the window; or whether the adjoining owner may build so as to substantially diminish the light provided that no actual nuisance is created. After a long controversy the question is now settled in the latter sense (*t*), but some mention of the earlier authorities appears to be desirable.

Aldred's Case.

In *Aldred's Case* (*u*), an action on the case for building a pig-stye and obstructing lights, it was resolved that the action was well maintainable, "for in a house four things are desired, *habitatio hominis, delectatio inhabitantis, necessitas luminis et salubritas aeris*,

(*l*) 1832, 1 Mood. & R. 230; 42 R. R. 784.

(*m*) See, e.g., *Potts v. Smith*, 1868, 6 Eq. 318, per Malins, V.-C.; 38 L. J. Ch. 58; *Garritt v. Sharpe*, 1835, 3 A. & E. 325; *Scott v. Pape*, 1886, 31 Ch. D. 554, per Bowen, L.J., 571; 55 L. J. Ch. 426; *Harris v. De Pinna*, 1886, 33 Ch. D. 238; 56 L. J. Ch. 344. A skylight is sufficient (*Harris v. Kinloch*, 1895, W. N. 60).

(*n*) See ante, p. 198.

(*o*) *Harris v. Kinloch*, 1895, W. N. 60; *Easton v. Isted*, 1903, 1 Ch. 405; 72 L. J. Ch. 189.

(*p*) *Myers v. Catterson*, 1889, 43 Ch. D. 470; 59 L. J. Ch. 315.

(*q*) *Scott v. Pape*, 1886, 31 Ch. D. 575; 55 L. J. Ch. 426.

(*r*) *Andrews v. Waite*, 1907, 2 Ch. 509; 76 L. J. Ch. 676.

(*s*) *Courtauld v. Legh*, 1869, L. R. 4 Exch. 126; 38 L. J. Ex. 45 (a case of an unfinished house); *Cooper v. Straker*, 1888, 40 Ch. D. 21; 58 L. J. Ch. 26 (window with iron shutters only opened occasionally); *Collis v. Laughner*, 1894, 6 Ch. 659; 63 L. J. Ch. 851 (window spaces opened, but no window sashes put in); *Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437 (windows obscured by shelves).

(*t*) *Colls v. Home Stores*, 1904, A. C. 179; 73 L. J. Ch. 484. As to what amounts to a nuisance, see post, Part III., chap. 7.

(*u*) 1611, 9 Rep. 58 b.

and for nuisance done to three of them an action lies, *sc.* (1) to the habitation of a man, for that is the principal end of a house : (2) for hindrance of the light, for the ancient form of an action on the case was significant, *sc.*, *quod messuagium horrida tenebritate obscuratum fuit*," &c.

Extent of
right
acquired
by user.

In *Fishmongers' Co. v. East India Co.* (x), in refusing an application to restrain building so as to stop up lights, Lord Hardwicke said : "As to the question of whether the plaintiffs' messuage is an ancient building so as to entitle them to the rights of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here ; for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion it is not a nuisance contrary to law ; for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city ; and here will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground."

*Fishmongers'
Co. v. East
India Co.*

In *Buck v. Stacey* (y) Best, C.J., directed the jury that "it was not sufficient to constitute an illegal obstruction that the plaintiff had in fact less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes for which it might otherwise have been applied. In order to give a right of action and sustain the issue there must be a substantial deprivation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

*Buck v
Stacey.*

In *Parker v. Smith* (z) Tindal, C.J., in summing up, said : "The question in this case is, whether the plaintiff has the same enjoyment now which he used to have before of light and air in the occupation of his house ; whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible, every speculative, exclu-

*Parker v.
Smith.*

(x) 1752, 1 Dickens, 163. See also *Cotterell v. Griffiths*, 1801, 4 Esp. 69 ; *A.-G. v. Nichol*, 1809, 16 Ves. 338 ; 10 R. R. 186.

(y) 1826, 2 C. & P. 465 ; 31 R. R.

679.

(z) 1832, 5 C. & P. 438 ; 38 R. R. 828 ; and see *Pringle v. Wernham*, 1836, 7 C. & P. 377.

Extent of
right
acquired
by user.

sion of light which is the ground of an action ; but that which the law recognizes is, such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants' premises had been injured by fire, and they re-erected them in a different manner. They have the right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment by the plaintiff of light and air. It is contended by the defendants that, on the whole, the light and air are increased. If, as matters now stand, upon the evidence you have heard, you think that this is a true proposition, then the plaintiff will have no ground of action. But if, on the contrary, you think that in effect these alterations (though they may certainly be improvements) on the whole diminish the quantity of light and air, then you will find for the plaintiff for nominal damages ; and your verdict will have no other effect than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains."

Wells v. Ody.

In *Wells v. Ody* (a) Parke, B., adopted the law as laid down by Tindal, C.J., in *Parker v. Smith*, but left to the jury the question whether the effect of the defendant's building was to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation.

Reviewing the authorities down to this point, it is noticeable that, while in most of the earlier cases the question raised is whether the effect of the building is to create a nuisance or not, in the cases from *Parker v. Smith* downwards more stress is laid on the diminution of the light formerly enjoyed by the dominant owner.

*Clarke v.
Clark.*

In *Clarke v. Clark* (b) the defendant had erected a building which undoubtedly diminished the amount of lateral light coming to the plaintiff's ancient window, and rendered the plaintiff's room less cheerful, especially during the winter months. But Lord Cranworth refused an injunction, saying that there was not such an obstruction of light as to amount to a nuisance. "The window in question," he said, "still receives greatly more light than falls to the lot of inhabitants of towns generally. . . . What the plaintiff was bound to show was, that the buildings of the defendant caused such an obstruction to light as to interfere with the ordinary occupations of life. . . . The real question is not what is, scientifically estimated, the amount

(a) 1836, 7 C. & P. 410 ; 5 L. J. (N. S.) Ex. 199 ; 46 R. R. 358, Preface, v.

(b) 1865, 1 Ch. 16 ; 35 L. J. Ch. 151. See also the discussion about this date

of the alternative remedies of an injunction or damages in *Jackson v. Newcastle*, 1864, 3 D. J. & S. 275 ; 33 L. J. Ch. 393 ; 142 R. R. 64.

of light intercepted, but whether the light is so obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life.”

In *Yates v. Jack* (c) the same judge, holding that the defendant's new buildings would materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business, restrained the defendant from building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected which would cause any such obstruction. The judgment in this case indicates no intention on Lord Cranworth's part to depart from the rule laid down by him in *Clarke v. Clark*, but the effect of the order (as set out above) was to preserve to the plaintiffs the whole of the light previously enjoyed by them, without any express reference to the question whether it could be diminished without causing a nuisance. The form of the order in *Yates v. Jack*, which was in use for many years after that decision, and probably contributed to the uncertainty which existed as to the nature of the dominant owner's rights (d), was in this respect modified in *Colls' Case* (e).

In *Durell v. Pritchard* (f), *Carriers' Co. v. Corbett* (g), and *Robson v. Whittingham* (h) Knight-Bruce and Turner, L.JJ., followed *Clarke v. Clark*, in each case refusing to grant an injunction on the ground that no material damage had been shown.

In *Kelk v. Pearson* (i) the principle was clearly stated by James, L.J. “On the part of the plaintiff,” he says, “it was argued before us that this was an absolute right—that now, under the statute 3 & 4 Will. 4, c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house. . . . Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before the statute was to have that amount of light for a house which was sufficient, according to the ordinary notions of mankind,

Extent of right acquired by user.

Yates v. Jack.

Kelk v. Pearson.

(c) 1866, 1 Ch. 295; 35 L. J. Ch. 539.

(d) See, e.g., the judgments in *Dent v. Auction Mart Co.*, 1866, 2 Eq. 236; 35 L. J. Ch. 555; *Martin v. Headon*, 1866, 2 Eq. 425; 35 L. J. Ch. 602; and *Calcraft v. Thompson*, 1867, 15 W. R. 367, which cannot now be altogether relied upon as good law.

(e) See per Lord Macnaghten, 1901, A. C. at p. 193; 78 L. J. Ch. 484.

(f) 1865, 1 Ch. 244; 35 L. J. Ch. 223.

(g) 1865, 13 W. R. 1056.

(h) 1866, 1 Ch. 442; 35 L. J. Ch. 227.

(i) 1871, 6 Ch. 809.

Extent of
right
acquired
by user.

for the comfortable use and enjoyment of that house as a dwelling-house, if it was a dwelling-house, or for the beneficial use and occupation of the house if it was a warehouse or a shop or other place of business. That was the extent of the easement, to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable"; and he says that the absolute and indefeasible right given by the statute is not greater. Mellish, L.J., laid down the rule in different terms; but it does not appear that he intended to differ from the above observations of James, L.J. (*k*).

*City of
London Co. v.
Tennant.*

In *City of London Co. v. Tennant* (*l*) the same rule was repeated and applied, and an injunction was refused, Lord Selborne being a party to the decision (*m*).

Result of
above
authorities.

The judgments in *Clarke v. Clark*, *Kelk v. Pearson*, and *City of London Co. v. Tennant* clearly laid down the rule that the Court will not interfere to protect ancient lights unless there is such an obstruction of the light as to interfere with the comfortable use and enjoyment of the building according to the ordinary notions of mankind; in other words, unless a nuisance is caused (*n*).

Some doubt-
ful decisions.

But the impression derived from *Parker v. Smith* and some of the succeeding cases, that the dominant owner was entitled to the whole of the light which had been accustomed to pass through his windows during the statutory period, was not finally removed even by these decisions. In *Scott v. Pape* (*o*) the repudiated doctrine reappeared in its most extreme form. In that case Cotton, L.J., said: "After twenty years the person who owns a dwelling-house, if he has used and enjoyed light, gets the absolute right to what he has used and enjoyed; and in my opinion the quantum of his enjoyment is defined by, and must depend on, the area of his windows, and also on the distance they are from other buildings. He acquires, in consequence of the position of other buildings and the size of the window, a right under this section (s. 3 of the Prescription Act) to the enjoyment of that particular light which has come to his building. The 'access and use of light' depends upon the number of pencils of light which come directly or by refraction into that window." Bowen, L.J., was even more emphatic: "Coming to the language

Scott v. Pape.

(*k*) See per Lord Davey in *Colls' Case*, 1904, A. C. at p. 200; 78 L. J. Ch. 484.

(*l*) 1873, 9 Ch. 212; 43 L. J. (N. S.) Ch. 457.

(*m*) Cf. *Leech v. Schweder*, 1874, 9

Ch. 463; 43 L. J. (N. S.) Ch. 487 (a case of grant).

(*n*) Cf. *Eccl. Commrs. v. Kino*, 1880, 14 Ch. D. 213; 49 L. J. Ch. 529.

(*o*) 1886, 31 Ch. D. 554; 55 L. J. Ch. 426.

of the section, what does it do? It seems to me that it creates an indefeasible right to the access of a specific quantity of light for the use of the house, workshop or building." And in *Warren v. Brown* (p) the Court of Appeal, adopting a similar view, reversed a considered judgment of Wright, J. (q), and granted an injunction, notwithstanding that abundant light was left for purposes of ordinary habitation and business. "If," said Romer, L.J., in delivering the judgment of the Court, "ancient lights are interfered with substantially and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. With regard to the exact point arising in this case we think that, since the case of *Kelk v. Pearson* (r), it is impossible to hold that the statutory right is not interfered with merely because after the interference the house may still come up to some supposed standard as to what a house ordinarily requires by way of light for the purposes of inhabitation or business."

Extent of
right
acquired by
user.
*Warren v.
Brown.*

But in *Colls v. Home Stores* (s) the question was again raised, and on this occasion carried to the ultimate Court of Appeal. In that case Joyce, J., before whom the action was tried, held that, if the plaintiffs were (as they contended) entitled to the full amount of light then enjoyed without appreciable diminution, they would have had a good cause of action upon the erection of the defendant's building. But he found as a fact that the plaintiffs' premises would, even after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business: and, following the decision of Wright, J., in *Warren v. Brown* (which had not then been reversed), he dismissed the action. The Court of Appeal, following their own decision in *Warren v. Brown*, reversed the decision of Joyce, J. In the House of Lords, the decision of the Court of Appeal was reversed, and the judgment of Joyce, J., restored, the decision of the Court of Appeal in *Warren v. Brown* being at the same time overruled.

*Colls v.
Home Stores.*

Lord Macnaghten considered that the principles governing the question were most clearly stated in *Back v. Stacey* (ante, p. 291) and *Parker v. Smith* (ante, p. 291). The other learned Lords founded their judgments largely on the views expressed in *Clarke v. Clark*, *Kelk v. Pearson*, and *City of London Co. v. Tennant*, of which they entirely approved. Lord Macnaghten said that the qualification

(p) 1902, 1 K. B. 15; 71 L. J. K. B. 12.

(r) Above, p. 293.

(q) 1900, 2 Q. B. 722; 69 L. J. Q. B. 842.

(s) 1902, 1 Ch. 302; 1904, A. C. 179; 71 L. J. Ch. 146; 73 L. J. Ch. 484.

Extent of
right
acquired
by user.

of these views suggested by Bowen, L.J., in *Scott v. Pape* (t) was not well founded. Lord Davey referred to the supposed inconsistency between Lord Cranworth's two judgments in *Clarke v. Clark* and *Yates v. Jack*, and said that the language used by Lord Cranworth in the latter case was directed to the argument with which he was dealing. Lord Lindley pointed out that in *Yates v. Jack* the plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes.

Results of
Colls v.
Home Stores.

It will be seen that in the speeches of the learned Lords in *Colls v. Home Stores* the whole question of the nature and extent of the prescriptive right to light was reviewed. It is proposed therefore to state shortly some of the conclusions which result from this decision, which has now become the leading one on the subject.

Measure of
right to light.

In the first place, according to Lord Lindley an owner of ancient lights is, generally speaking, entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, shop, or other place of business (u). With this agrees Lord Davey, who describes the measure of the right to light through ancient windows as being that which is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind (x).

Nuisance
must be
proved.

Again, according to the House of Lords, the test of the right to bring an action to restrain an obstruction of light is whether the obstruction complained of is a nuisance (y).

Nature of
requisite
evidence.

Bearing these conclusions in mind, let us turn to the points to which the evidence in such an action must be directed. It is clear that to a certain extent there must always be a comparison between the present and the past condition of the dominant tenement. The complete inquiry to be undertaken by the Court includes two branches—viz., (A) whether the acts of the defendant have so altered the condition of the dominant tenement as to make it substantially less comfortable or fit for use; and (B) whether the result of this alteration is to leave the dominant tenement without sufficient light for ordinary comfort or use. In undertaking the inquiry the Court may find three different conditions of the dominant tenement

(t) Above, p. 294.

(u) 1904, A. C. 208; 73 L. J. Ch. 500.

(x) 1904, A. C. p. 204; 73 L. J. Ch. 498.

(y) Per Lord Halsbury, 1904, A. C. 185; per Lord Davey, ib. p. 204; per Lord Lindley, ib. p. 210; 73 L. J. Ch. 488, 498, 502.

before the obstruction: (1) The dominant tenement may have originally enjoyed a poor light: (2) the dominant tenement may originally have enjoyed an average light; and (3) the dominant tenement may originally have enjoyed an unusually good light. In dealing with each of these three conditions, branch (A) of the above inquiry would always be necessary. In the case of condition No. 1, however, it would probably be the only branch to pursue. In the case of condition No. 2 branch (B) might possibly become also necessary. And in dealing with condition No. 3, branch (B) would certainly be also necessary.

Extent of
right
acquired
by user.

Take now condition No. 3, and let us suppose that in such a case the evidence showed that the obstruction had rendered the dominant tenement substantially less comfortable or fit for use; but also showed that after the obstruction that tenement enjoyed sufficient light whether for ordinary comfortable enjoyment or for ordinary user. Under such circumstances, can the dominant owner maintain an action? On this question the opinion of some judges seems to be that under these circumstances the dominant owner can maintain an action (z). The opinion of other judges seems to be that he cannot (a). And for the present the law appears not to be settled.

On the question of nuisance or no nuisance there are some further points which are clear. Thus, the Court must bear in mind the locality (b). And it would seem that the result of an inquiry whether there is a nuisance may differ according as the building is situate in town or country (c). In the case of nuisance other than obstructions to light, the question varies with locality (d).

Considera-
tions to
which Court
should have
regard in
deciding on
nuisance.
Locality.

(z) See the opinions expressed in *Kine v. Jolly* by Kekewich, J., 1905, 1 Ch. 483; 74 L. J. Ch. 175; by Vaughan Williams, L.J., 1905, 1 Ch. 494; 74 L. J. Ch. 178; Cozens-Hardy, L.J., 1905, 1 Ch. 503; 74 L. J. Ch. 187; Lord James, 1907, A. C. 4; 76 L. J. Ch. 2; and possibly by Lord Lindley in *Colls v. Home Stores*, 1904, A. C. 210; 73 L. J. Ch. 502.

(a) See the opinions expressed by Farwell, J., in *Higgins v. Betts*, 1905, 2 Ch. 215; 74 L. J. Ch. 621; by Romer, L.J., in *Kine v. Jolly*, 1905, 1 Ch. 501; 74 L. J. Ch. 174; Lord Robertson, S. C., 1907, A. C. 5; and Lord Atkinson, 1907, A. C. 7; and possibly by Lord Davey in *Colls v. Home Stores*, 1904, A. C. 196; 73 L. J. Ch. 484.

(b) See the words of Lord Halsbury, 1904, A. C. 185; of Romer, L.J., in

Kine v. Jolly, 1905, 1 Ch. 497; 74 L. J. Ch. 174; and of Farwell, J., in *Higgins v. Betts*, 1905, 1 Ch. 216; 74 L. J. Ch. 621.

(c) See per Lord Halsbury, 1904, A. C. 183-185; 73 L. J. Ch. 484. Before the decision in *Colls v. Home Stores*, there was some difference as to this. See, on the one hand, the opinions of Kindersley, V.-C., in *Martin v. Headon*, 1866, 2 Eq. 430; 35 L. J. Ch. 602, and of Wood, V.-C., in *Dent v. Auction Market Co.*, 1866, 2 Eq. 248; 35 L. J. Ch. 555; and, on the other hand, the words of Lord Cranworth in *Clarke v. Clark*, 1865, 1 Ch. 18; 35 L. J. (N. S.) P. 94, and of Knight-Bruce, L.J., in *Robson v. Whittingham*, 1866, 1 Ch. 444; 33 L. J. Ch. 227.

(d) *Rushmer v. Polsue*, 1906, 1 Ch. 250; 1907, A. C. 123; 76 L. J. Ch. 365.

Extent of
right
acquired
by user.

Light from
other
sources.

Again, the Court should have regard to light coming from sources other than that which has been obstructed ; but only so far as this other light is light which the dominant owner is entitled by grant or prescription to enjoy. Light of which such owner may be deprived at any time ought not to be taken into account (e). In this connection it should be pointed out that as between the dominant and servient owners the right to ancient light is a negative easement over the servient tenement considered as a whole ; and where the servient owner raised part of his tenement and lowered part, so that the net light was unaltered, the dominant owner could not complain (f).

Glazed tiles.

It should also be noted here that if an actionable nuisance is proved, it is not sufficient for the person who obstructs the light to offer to patch up the injury he is doing by putting glazed tiles in front of the windows in question. "A person who wishes to preserve his light has no power to compel his neighbour to preserve the tiles or a mirror (which might be better), or to keep them clean ; nor has he covenants for these purposes that will run with the land or affect persons who take without notice. And, therefore, it is quite preposterous to say, Let me damage you, provided we apply such and such a remedy" (g).

Future use of
dominant
tenement.

As regards the future use of the dominant tenement, it was laid down by Cockburn, C.J., that the Court should consider not only the actual present use of the premises but also any purpose to which it may be reasonably expected that in the future they may be applicable (h). And it seems that this rule has not been altered by the decision in *Colls v. Home Stores*. Thus Lord Davey says that regard may be had not only to the present use but also to any ordinary uses to which the dominant tenement is adapted, and that a man does not restrict his right by not using the full measure of light which the law permits (i). It appears also to be the opinion of Lord Lindley that if the dominant owner chooses to use a well-lighted room for a lumber-room for which little light is required, he does not

(e) See the words of Lord Lindley, 1904, A. C. 211 ; 73 L. J. Ch. 484 ; and the words in the judgments in *Kine v. Jolly*, used by Romer, L.J., 1905, 1 Ch. 497 ; 74 L. J. Ch. 174 ; by Vaughan Williams, L.J., 1905, 1 Ch. 493, and by Lord Atkinson, 1907, A. C. 7 ; 73 L. J. Ch. 484. Since *Colls v. Home Stores* it is doubtful whether the words of James, V.-C., in *Dyers' Co. v. King*, 1870, 9 Eq. 442 ; 39 L. J. Ch. 339, hold good to their full extent.

(f) *Davis v. Marrable*, 1913, 2 Ch.

421 ; 82 L. J. Ch. 510.

(g) Per Wood, V.-C., in *Dent v. Auction Mart Co.*, 1866, 2 Eq. 238, 251 ; 35 L. J. Ch. 555. Cf. *Mackey v. Scottish Widows'*, 1877, Ir. R. 11 Eq. 541.

(h) *Moore v. Hall*, 1878, 3 Q. B. D. 181, 183 ; 47 L. J. Q. B. 334 ; and see *Aynsley v. Glover*, 1874, 18 Eq. 551 ; 43 L. J. (N. S.) Ch. 777 ; *Dicker v. Popham*, 1890, 63 L. T. 379.

(i) 1904, A. C. 202, 203 ; 73 L. J. Ch. 484.

lose his right to use at some future time the same room for some other purpose for which more light is required (j).

Shortly after the decision in *Colls v. Home Stores* the question was again considered in *Kine v. Jolly* (k), which was argued successively in three Courts. Kekewich, J., in granting to the dominant owner an injunction against an obstruction, said: "The great cause of complaint has been of the obstruction to light to what has been called the morning-room. . . . That there has been a large obstruction of light by the erection of the defendant's house is abundantly clear, and I think it is also clear that there has been a large interference with the cheerfulness of the room. . . . I am convinced that the character of the room is altered, and that though still a well-lighted room it has lost in the obstruction of light one of its chief charms and advantages. . . . Having given all the circumstances full consideration, I have come to the conclusion that the obstruction to the light of the morning-room is a nuisance within the meaning of the authorities on that subject." This decision was affirmed by a majority of the Court of Appeal; and an appeal to the House of Lords also failed, the House being equally divided in opinion. Difficulty was caused by the learned judge's finding that the room was "still a well-lighted room"; but Lord Loreburn, L.C., interpreted this as meaning that it was well lighted, not according to the standard to be expected in the actual locality and surroundings, but according to the standard of a crowded city. It seems clear that the decision stood by reason of the express finding that there was a nuisance.

The effect of the authorities, including *Colls' Case*, was stated by Farwell, J., in *Higgins v. Betts* (l) as follows: "Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act. When he has so acquired it he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house according to the usages of ordinary persons in that locality is actionable as a nuisance at common law. His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise; and in like manner his neighbour's new building may be a nuisance in respect of interference with light. The difference between the right to light and the right

Extent of
right
acquired
by user.

Cases subse-
quent to *Colls*
v. Home
Stores.

Kine v. Jolly.

Higgins v.
Betts.

(j) 1904, A. C. 211. The decision in *Martin v. Goble*, 1808, 1 Camp. 320, has been quoted in favour of the opposite view. The decision may be supported on a different ground: see

1904, A. C. 202; 73 L. J. Ch. 484.

(k) 1905, 1 Ch. 480; 1907, A. C. 1.

(l) 1905, 2 Ch. 210; 74 L. J. Ch. 621.

Extent of
right
acquired
by user.

Cases subse-
quent to
Colls v. Home
Stores.

Higgins v.
Betts.

to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced, the two latter are ab initio incident to the right of property. But the wrong done is in both cases the same, viz. :—the disturbance of the owner in his enjoyment of his house. Inasmuch as the acquisition of the easement was a necessary condition precedent to the right to sue, the Courts appear in many cases to have addressed themselves rather to the extent of the easement acquired and the amount of such easement taken away by the defendant, than to the sufficiency for ordinary purposes of the amount of light left, so much so that many expressions can be found that lend support to the argument that the right to light was a right of property for which trespass would lie. The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from the light acquired and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirement. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect that *Colls' Case* has to my mind readjusted the law. It is still, as it always has been, a question of nuisance or no nuisance, but the test of nuisance is not 'how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?' but 'how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?' . . . This puts the case of nuisance by interference with light on the same footing as other cases of nuisance, e.g., noise: for, apart from the question of locality, which is always important in considering the question of nuisance or no nuisance, the fact that the owner of a house had enjoyed an exceptional quiet gave him no right to more than the ordinary freedom from extraordinary noises."

Before *Colls v. Home Stores* some judges had been inclined, in dealing with the easement of light, to establish a specific test, and referred to the Metropolis Management Amendment Act, 1862 (*m*),

Angle of
forty-five
degrees.

(*m*) 25 & 26 Vict. c. 102, s. 85: repealed by the London Building Act, 1894, and re-enacted (with modifica-

tions) by s. 49 of that Act. Cf. the bye-law of the Metropolitan Board, given in 2 Ch. D. 168, n.

which contained the following clause:—"No building, except a church or chapel, shall be erected, on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works, nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; and, in determining the height of such building, the measurement shall be taken from the level of the centre of the street immediately opposite the building up to the parapet or eaves of such building." It would appear, both from the character of the statute and also from the direction to measure the distance in every case, not from the sill of any window, but from the level of the street, that the clause was primarily intended, not to protect the enjoyment of light in private houses, but to ensure the free passage of air and sunlight to the streets themselves. But in some cases it was suggested that a rule as to light was there laid down (*n*). This question has now been set at rest by *Colls v. Home Stores* (*o*), where it was laid down that there is no hard and fast rule with regard to the angle of forty-five degrees. "There is no rule of law," said Lord Lindley (*p*), "that if a person has forty-five degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window: *Theed v. Debenham* (*q*). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of forty-five degrees is left to him, especially if there is good light from other directions as well. The late Lord Justice Cotton pointed this out in *Ecclesiastical Commissioners v. Kino* (*r*). See also *Parker v. First Avenue*" (*s*).

Extent of
right
acquired
by user.
Angle of
forty-five
degrees.

The question as to the angle of forty-five degrees had been previously dealt with by Lord Selborne in *City of London Co. v. Tennant*, where he also discusses the evidence requisite to sustain an action to restrain lateral obstructions (*t*).

Lateral
obstructions.

(*n*) *Hackett v. Baiss*, 1875, 20 Eq. 494. See also *Beadel v. Perry*, 1866, 3 Eq. 465; *City of London Co. v. Tennant*, 1873, 9 Ch. 212; 43 L. J. (N. S.) Ch. 457; *Theed v. Debenham*, 1876, 2 Ch. D. 165; *Ecc. Commrs. v. Kino*, 1880, 14 Ch. D. 213; 49 L. J. Ch. 529.

(*o*) 1904, A. C. 179; 73 L. J. Ch. 484.

(*p*) 1904, A. C. 210.

(*q*) 1876, 2 Ch. D. 165.

(*r*) 1880, 14 Ch. D. 228; 49 L. J. Ch. 529.

(*s*) 1883, 24 Ch. D. 282.

(*t*) 1873, 9 Ch. 220; 43 L. J. (N. S.) Ch. 457. See also, as to lateral obstructions, *Clarke v. Clark*, 1865, 1 Ch. 16; 35 L. J. (N. S.) P. 94.

Extent of right acquired by user.

Nature of the right to light is the same, whether acquired by prescription or grant.

Extraordinary light.

Ambler v. Gordon.

The language used by the judges in *Colls v. Home Stores* has further made it clear that the nature and extent of the prescriptive right to light acquired by user was not altered by the Prescription Act, which was only concerned with the conditions or length of user (*u*). The nature of the right is in fact the same whether it be claimed by prescription at common law, or under the statute (*v*), or by lost grant, or by grant implied on a disposition by the owner of the two tenements (*w*), or under a grant of "lights" among the general words of a deed (*x*).

A question has from time to time arisen as to whether the owner of a tenement who for upwards of twenty years has carried on there a business requiring an extraordinary amount of light, and has in fact enjoyed such light, thereby acquires a prescriptive right to such extraordinary enjoyment. This question was discussed in *Lanfranchi v. Mackenzie* (*y*), *Dickinson v. Harbottle* (*z*), *Mackey v. Scottish Widows'* (*a*), *Cartwright v. Last* (*b*), *Theed v. Debenham* (*c*), *Lazarus v. Artistic Co.* (*d*), and *Parker v. Stanley* (*e*); and was finally decided in the negative in *Ambler v. Gordon* (*f*). Bray, J., in giving judgment in the last mentioned case, referred to words of Lord Davey in *Colls v. Home Stores*, where he says (*g*): "It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which the law permits. . . . If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard?"

In the case of leases, however, the Court has protected special light required for the business of a diamond merchant so described in the lease (*h*), but not special light required for a business (that of a wool-broker) not immediately contemplated at the date of the lease (*i*). Where in the case of a lease special light is protected no

(*u*) See the words of Lord Halsbury, L.C., 1904, A. C. 183; 73 L. J. Ch. 484, and of Lord Davey, 1904, A. C. 198, 199; 73 L. J. Ch. 484.

(*v*) *Ibid.*; see *Kelk v. Pearson*, 1871, 6 Ch. 813.

(*w*) *Leech v. Schweder*, 1874, 9 Ch. 472, 474; 43 L. J. (N. S.) Ch. 487.

(*x*) *Ibid.*

(*y*) 1867, 4 Eq. 421; 36 L. J. Ch. 518.

(*z*) 1873, 28 L. T. N. S. 186.

(*a*) 1877, Ir. R. 11 Eq. 541.

(*b*) 1876, W. N. 60.

(*c*) 1876, 2 Ch. D. 165.

(*d*) 1897, 2 Ch. 214; 66 L. J. Ch. 522.

(*e*) 1902, 50 W. R. 282.

(*f*) 1905, 1 K. B. 417; 74 L. J. K. B. 185.

(*g*) 1904, A. C. at p. 203; 73 L. J. Ch. 484.

(*h*) *Herz v. Union Bank*, 1859, 2 Giff. 686; 128 R. R. 230.

(*i*) *Corbett v. Jonas*, 1892, 3 Ch. 137; 62 L. J. Ch. 43.

easement is created, but an obligation is implied on the part of the lessor analogous to that which arises from a restrictive covenant (*k*). Extraordinary light.

In the course of the argument in *Colls' Case* (*l*) Lord Robertson said: "Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from building a house which would have done no harm to the light if there had been five windows?" A question of this nature may hereafter arise; but there is no doubt that in many cases a window having what is called "a bad light" has received even greater protection from the Courts than the window of a well-lighted room. Bad light.

By the custom of London, a man might rebuild his house, or other edifice, upon the ancient foundation to what height he pleased, though thereby the ancient windows or lights of the adjoining house were stopped, if there were no agreement in writing to the contrary (*m*). Custom of London.

This custom remains binding where light is claimed by prescription at common law. But *where the right is claimed under the statute*, a justification of a disturbance by force of this custom is taken away by the express enactment (s. 3), "any local custom or usage notwithstanding" (*n*).

Although in this country, owing to the great value of land in cities and the small extent of properties, men are tenacious of every ray of light, and go through an immense amount of litigation to assert their right to it, in some of the United States of America the doctrine of the English law does not prevail, and a right to light cannot be acquired by prescription or implied grant: the Courts there applying to the case of windows the reasoning in *Webb v. Bird* (*o*). In other states the rule of the English law is adopted (*p*). Law of United States.

(*k*) *Brown v. Flower*, 1911, 1 Ch. 226; 80 L. J. Ch. 181.

(*l*) 1904, A. C. 181; 73 L. J. Ch. 484.

(*m*) Com. Dig. London, N. (5); *Winstanley v. Lee*, 1818, 2 Swans. 239.

(*n*) *Perry v. Eames*, 1891, 1 Ch. 667; 60 L. J. Ch. 345. See *Salters' Co. v. Jay*, 1842, 3 Q. B. 109; 11 L. J. Q. B. 173; 61 R. R. 147; *Truscott v. Merchant Taylors' Co.*, 1856, 11 Exch. 855; 25 L. J. Ex. 173; 105 R. R. 827; *Cooper v. Hubback*, 1862, 12 C. B. N. S. 456; 31 L. J. C. P. 323.

(*o*) See Part III., ch. 4, *post*. "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and I see that it

has recently been sanctioned with some qualifications by an Act of Parliament; but it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law; and, besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. There were two nisi prius decisions at an earlier day; but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the King's Bench. This was clearly a departure from the old law": per Bronson, J., in *Parker v. Foote*, 19 Wend. (N. Y.) 309.

(*p*) Washburn on Easements, 583.

CHAPTER III.

PROSPECT AND PRIVACY.

Easement of prospect not acquired by enjoyment.

By the laws of all countries, and by the English law at a very early period, it appears that an action would lie for the obstructing of ancient lights (*a*). Although, however, by the civil law, a servitude of prospect could be acquired in the same manner as any other servitude, the law of England recognizes no such right as a right in the nature of an easement (*b*). Of the existence of the right, however, when created by express grant or covenant, the squares in London afford well-known instances. The validity of restrictions thus imposed is fully recognized by the Lord Chancellor in the case of *Squires v. Campbell* (*c*). In *A.-G. v. Doughty* (*d*) a motion was made to restrain the defendant from intercepting the prospect from Gray's Inn Gardens; and the report states "that the interposition of the Court was desired, not on the foundation of a nuisance, but on a long enjoyment of right to this prospect by this society, which right had been admitted formerly by parties concerned to dispute it, and by a court of equity; namely, in 1686, when several orders on petitions were made by Lord Jefferies to restrain the building so as to intercept this prospect: and the manner of defence thereto shows this right of the society was not disputed, it only going upon this, that the Court was imposed on by the plans shown. That rights of this kind have been taken notice of appears from the Act of Parliament made for adorning Lincoln's Inn, where the parties acquiesced under such a right." Lord Hardwicke, however, refused to grant an injunction before answer, saying, "I know no general rule of common law which says that building so as to stop another's prospect is a nuisance; was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town. It depends on a particular right, and then the party must first have an opportunity to answer it. As to the orders made by

(*a*) *Aldred's Case*, 1611, 9 Rep. 58 b, and cases there cited.

(*b*) "The law don't give an action for such things of delight," (*Aldred's Case*, ubi sup.; *Foli v. Devonshire Club*, 1887, 3 T. L. R. 706; *Campbell v. Paddington*, 1911, 1 K. B. 876; 80

L. J. K. B. 739).

(*c*) 1836, 1 My. & Cr. 459; 6 L. J. (N. S.) Ch. 41; 43 R. R. 231.

(*d*) 1788, 2 Ves. Sen. 452. See as to this case, *Dalton v. Angus*, 1881, 6 App. Cas. 824; 50 L. J. Q. B. 689.

Lord Jefferies, who was too apt to do things in an extraordinary manner, fortiter in modo as well as in re, they were made on petition, without a bill filed, and those I lay out of the case. There may be such a right as this, as in the case of the Act of Parliament touching Lincoln's Inn. That was upon agreement of the parties, which, if shown here, it would be different, or if there was ground to presume such an agreement." Again, in *Fishmongers' Co. v. East India Co. (e)*, Lord Hardwicke says: "It is true that the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant; but that is no reason to hinder a man from building on his own ground."

Easement of prospect not acquired by enjoyment.

A covenant, however, not to obstruct a prospect will be enforced in equity (*f*). The enforcement by the Court of a covenant not to build so as to obstruct a view has been described as an extension in equity of the doctrine of negative easements (*g*). Such a covenant binds a subsequent equitable owner although without notice, and a subsequent legal owner, unless he is protected as a purchaser for value without notice (*h*). It in effect creates an equitable easement (*i*). The doctrine, however, does not extend to the case where the covenantee had no land capable of enjoying as against the land of the covenantor the benefit of the restrictive covenant (*k*). The grant of a right to an unobstructed prospect will not be manufactured out of the common covenant for quiet enjoyment (*l*).

Covenant as to prospect.

As regards the view of business premises, it was decided in *Butt v. Imperial Gas Co. (m)* that the plaintiff could not complain of the erection of a gasometer on the ground that it would prevent his premises and name-board from being seen from the high-road, and so deprive him of chance customers. Apparently the name-board had not stood for twenty years; but if it had, the decision would have been the same (*n*).

View of business premises.

As regards privacy, no action lies for the loss of privacy or amenity

Privacy.

(e) 1751, 1 Dickens, 163. Cf. *Knowles v. Richardson*, 1681, 1 Mod. 55.

(f) *Piggott v. Stratton*, 1849, 1 D. F. & J. 33; 29 L. J. Ch. 1; 125 R. R. 336; *Western v. Macdermott*, 1866, 2 Ch. 72; 35 L. J. Ch. 190. Cf. *McLean v. McKay*, 1873, 5 P. C. 327; *Murray v. Dunn*, 1907, A. C. 283.

(g) *L. & S. W. R. v. Gomm*, 1882, 20 Ch. D. 583; 51 L. J. Ch. 530.

(h) *Ibid.* See *Rogers v. Hosegood*, 1900, 2 Ch. 405; 69 L. J. Ch. 652; *Osborn v. Bradley*, 1903, 2 Ch. 451; 73 L. J. Ch. 49; *Formby v. Barker*, 1903, 2 Ch. 552; 72 L. J. Ch. 716. In its earlier form the doctrine depended

on notice (*Tulk v. Moxhay*, 1848, 2 Ph 774. See the judgment of Scrutton, J., in *L. C. C. v. Allen*, 1914, 3 K. B. 664; 83 L. J. K. B. 1695).

(i) *Re Nisbet and Potts*, 1906, 1 Ch. 410; 75 L. J. Ch. 238.

(k) *L. C. C. v. Allen*, 1914, 3 K. B. 642; 83 L. J. K. B. 1695. See *Millbourn v. Lyons*, 1914, 2 Ch. 231; 83 L. J. Ch. 737.

(l) *Potts v. Smith*, 1868, 6 Eq. 317; 38 L. J. Ch. 58.

(m) 1866, 2 Ch. 158.

(n) See *Smith v. Owen*, 1866, 35 L. J. Ch. 317; 14 W. R. 422.

Privacy.

by the opening of windows in a neighbouring house (*o*), or a public road over neighbouring lands (*p*). Where a lease was granted by A. to B. of a flat for residential purposes, A. covenanting for quiet enjoyment, and A. subsequently permitted on an adjoining flat the erection of a staircase which interfered with B.'s privacy, the Court refused to treat this permission as a derogation from A.'s grant or a breach of her covenant for quiet enjoyment (*q*). An express covenant against building, however, was enforced on the ground that any building would cause an invasion of privacy and constitute damage (*r*).

Civil law.

By the civil law, the servitude "ne luminibus officiatur" was one of the ordinary urban servitudes (*s*); a similar servitude also existed for the right of prospect (*t*), which appears to have been very extensive.

(*o*) *Chandler v. Thomson*, 1811, 3 Camp. 80; 13 R. R. 756; *Johnson v. Wyatt*, 1863, 2 D. G. J. & Sm 27; 33 L. J. (N. S.) Ch. 394; *Tapling v. Jones*, 1865, 11 H. L. C. 305.

(*p*) See *Re Penny*, 1857, 7 E. & B. 660; 26 L. J. (N. S.) Q. B. 225; *Buccleuch v. Metropolitan Board*, 1870, L. R. 5 Exch. 221, 237; 39 L. J. Ex. 130.

(*q*) *Browne v. Flower*, 1911, 1 Ch. 219 (see pp. 222—227); 80 L. J. Ch. 181.

(*r*) *Manners v. Johnson*, 1875, 1 Ch. D. 673; 45 L. J. Ch. 404.

(*s*) Cum autem servitus imponitur—*ne luminibus officiatur*—hoc maxime

adepti videmur, ne jus sit vicino, invitis nobis, altius ædificare, atque ita minuire lumina nostrorum ædificiorum.—Dig. 8, 2, 4, de serv. præd. urb.

(*t*) Est et hæc servitus—*ne prospectui officiatur*.—Dig. 8, 2, 3.

Inter servitudes, *ne luminibus officiatur*, et *ne prospectui offendatur*, aliud et aliud observatur; quod in prospectu plus quis habet ne quid ei officiatur ad gratiorem prospectum et liberum: in luminibus autem (non officere) ne lumina cujusquam obscuriora fiant; quodcumque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debeat.—Ib. 15.

CHAPTER IV.

AIR.

AT one time it had become usual in referring to decisions upon the access to light to describe them as cases of light and air, and a formula of this description had crept into both pleadings and evidence (*a*). This, however, is inaccurate. For the grounds upon which the Court will restrain the obstruction of light may differ widely from the grounds upon which it will restrain the obstruction of air (*b*). Generally speaking, however, the modes in which a right to the access of light and a right to the access of defined air can be acquired are similar (*c*).

Right to light and to air.

The old authorities, indeed, mention a singular case of a claim to the access of air which might have the effect of imposing very extensive restrictions upon the owners of the neighbouring land. Winch, J., said "that where one erected a house so high that the wind was stopped from the windmills in Finsbury Fields, it was adjudged that it should be broken down" (*d*). And again, "in an assize of nuisance, brought because *levavit domum ad nocumentum* of his mill, by which the wind was stopped to come at his mill, so that he cannot grind, &c., and the jury find that the defendant has erected a house *de novo*, and that only two yards of the top of the house is to the nuisance, this is found for the plaintiff, for here the declaration is not falsified (*falsifié*) (*e*), but only abridged, and the judgment shall be, that the two yards be dejected" (M. 11 James I.,

Old authorities as to air.

(*a*) *Bryant v. Lefever*, 1879, 4 C. P. D. 180; 38 L. J. C. P. 380; *City of London Co. v. Tennant*, 1873, 9 Ch. 221; 43 L. J. (N. S.) Ch. 457; see *Dent v. Auction Mart Co.*, 1866, 2 Eq. 252; 35 L. J. Ch. 555.

(*b*) *City of London Co. v. Tennant*, *sup.*; *Baxter v. Bower*, 1875, 44 L. J. Ch. 625.

(*c*) *Cable v. Bryant*, 1908, 1 Ch. 263; 77 L. J. Ch. 78.

(*d*) Viner's Abridg. Nuisance, G. pl. 19, taken from Winch's Reports, 3, where, in what professes to be a report of the proceedings of the Court of Common Pleas in E. 19 James I., it is said: "Winch said it was adjudged

in this Court, that where one erected a house so high in Finsbury Fields, by the windmills, that the wind was stopped from them, it was adjudged in this case that the house shall be broken down." These reports professing to be a translation of the judge's own notes, it seems strange that, instead of reporting a case, he should record an anecdote told by himself in Court, and speak of himself in the third person. This is explained by the fact mentioned, in the preface to Benloe and Dalison, that Winch's Reports are improperly ascribed to that learned judge.

(*e*) This is erroneously printed "satisfied" in Viner, Nuisance, N. 2, pl. 6.

inter *Goodman and Gore and others*, adjudged) (f). But, in view of the later decisions, these authorities can no longer be considered good law.

Webb v. Bird. In *Webb v. Bird* (g), the plaintiff's windmill was built in 1829. The defendant, in 1860, built a schoolhouse within twenty-five yards from the mill, which obstructed the currents of air that would other-

(f) 2 Rolle's Abr. 704, Triall, C. pl. 23. The case referred to by Rolle is reported in Godb. 221 as *Trahern's Case* (C. P. 11 James), where, in an assize of nuisance, the plaintiff showed that he had a windmill, and that the defendant built a house so as it hindered his mill. The jury found that the defendant built the house, but that only two feet of it did hinder the plaintiff's mill, and was a nuisance. The Court (Hobart, C.J.) was of opinion that but part of the house should be abated, viz., that which was found to be a nuisance.

In *Goodman and Gore's Case* (C. P. 10 James, Godb. 189) Goodman brought an assize against Gore and others for erecting two houses to the west end of his windmill, per quod ventus impeditur, &c. It was given in evidence that the houses were about eighty feet from the mill in height, did extend above the top of the mill, and in length were twelve yards from the mill; and, notwithstanding, the Court (Coke, C.J.) directed the jury to find for the defendant (1861; see 10 C. B. N. S. 273, n.).

On the cases in Rolle and Winch, Willes, J., observes that there was a distinction between ordinary mills and the prescriptive right which the lord of a manor had to compel all residents within the manor to grind their corn at his mill. Privileged mills of that description had peculiar rights (10 C. B. N. S. 285).

These three windmill cases may perhaps be reduced to one, and that a case considered by the lawyers of the time as of no authority on the subject of easements. The first was tried before Coke, C.J., in 10 James I., reported by Godb. 189 as *Goodman v. Gore and Others*. It will be seen by the report that Lord Coke displayed a disposition to trip the plaintiff up on a point of form, a circumstance consistent with the fact of the house being built contrary to a royal proclamation which he would not directly oppose, as he was then on his preferment, being then Chief Justice of the Common Pleas, and soon after appointed Chief Justice of the King's Bench. His opinion of

these proclamations may be seen in 3 Inst. 201, "Of Buildings," where he says: "We have not read of any *Act of Parliament* now in force made against the excess of building, or touching the order or manner of building; but it is a wasting evil whereunto some wise men are subject." Also in 12 Rep. 74. The second case was tried the following year before Hobart, C.J., and brought to a more successful issue. It is cited by Rolle as *Goodman v. Gore*; the same as that given to the first by Godbolt. Rolle does not refer to Godbolt, and probably took the case from his own notes before Godbolt was published. Godbolt was published in 1652, when Rolle was Chief Justice of the Upper Bench. Winch, eight years afterwards, says that such a case had been adjudged in the Common Pleas, and his description of the case fits the cases in Godbolt. As to the authority of the windmill case, it is mentioned neither by Coke nor Hobart. Coke in his chapter on buildings (3 Inst. 201) says: "Also the common law prohibits the building of any edifice to the common nuisance or to the nuisance of any man in his house, as the stopping up of his *light*, or to any other prejudice or annoyance of him." Rolle does not abridge it under the head of "*Nusance*," where he abridges the judgment of Wray, C.J., in *Aldred's Case*, as to the stoppage of air to windows, but under the head of "*Trial*" as an authority for the position that where a plaintiff declares that a whole building is a nuisance, and the jury find part only to be so, the action shall not entirely fail.

In old maps of London a row of windmills appears on the heights to the north of London. Probably in the time of King James it was thought an alarming circumstance, as affecting the supply of food to the city, that any one should build so near them as to take the wind from their sails.

(g) 1861-3, 10 C. B. N. S. 268; 30 L. J. C. P. 384; 128 R. R. 707; 13 C. B. N. S. 841; 31 L. J. Ch. 335; 134 R. R. 756.

wise have passed to the mill ; and for the obstruction an action was brought which failed. The Court of Exchequer Chamber held that the plaintiff's claim could not be supported upon the presumption of a grant which only arose where the person against whom the right was claimed might have prevented the exercise of the subject of the supposed grant ; and in the case of the windmill such prevention would be, if not absolutely impossible, yet so difficult that no presumption of a grant could be founded upon non-prevention. Blackburn, J., said that he wished to guard against its being supposed that anything in the judgment affected the common law right that might be acquired to the access of air through a window.

Webb v. Bird.

In *Bryant v. Lefever* (*h*) the plaintiff and the defendants were occupiers of adjoining houses, which had remained in the same condition for thirty years. The defendants, in rebuilding, raised their house, thereby causing the plaintiff's chimneys to smoke. The plaintiff having brought an action claiming a right to have the free access of air to his chimneys, the Lords Justices held that the action failed. There was no natural right to such access ; for the establishment of such a right would prevent every adjoining owner from making a reasonable use of his land. Neither could the right be acquired by prescription, for the claim was vague and uncertain, and the enjoyment incapable of being interrupted by any reasonable means. Cotton, L.J., added that "it was unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property had been enjoyed as of right for a sufficient period, a right by way of easement could be acquired" (*i*).

Bryant v. Lefever.

It follows from the authorities above referred to that a general right to the access of air passing over the unlimited surface of neighbouring land cannot be acquired by prescription. This rule was applied to the case where a claim was made for such access of air to a windmill (*k*), or to the chimneys of a building (*l*), or to a structure for storing timber (*m*). The ground of the rule is that the right cannot be acquired against others by a user which they cannot interrupt (*n*).

Present rule as to acquisition of a right to access of air.

On the other hand, a right to the access of air can be acquired by prescription where such access is enjoyed either through a definite aperture or through a definite channel over adjoining property (*o*).

(*h*) 1879, 4 C. P. D. 172 ; 38 L. J. C. P. 380.

L. J. C. P. 335 ; 134 R. R. 756.

(*i*) Cf. *Harris v. De Pinna*, 1885, 33 Ch. D. 238 ; 56 L. J. Ch. 344.

(*l*) *Bryant v. Lefever*, 1879, 4 C. P. D. 172 ; 38 L. J. C. P. 380.

(*k*) *Webb v. Bird*, 1861-3, 10 C. B. N. S. 268 ; 30 L. J. C. P. 384 ; 128 R. R. 707 ; 13 C. B. N. S. 841 ; 31

(*m*) *Harris v. De Pinna*, 1886, 33 Ch. D. 238 ; 56 L. J. Ch. 344.

(*n*) 33 Ch. D. 262.

(*o*) *Bass v. Gregory*, 1890, 25 Q. B. D.

Gale v. Abbott. In *Gale v. Abbott* (*p*) and *Dent v. Auction Co.* (*q*) injunctions were granted to remove and prevent impediments to ventilation. In the first case the defendant was ordered to remove a skylight which he had placed over his yard, and which materially impeded the passage of air to the window of the plaintiff's kitchen. In the second case Wood, V.-C., says: "There is a staircase lighted in a certain manner by windows, which when open admit air. The defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high; and in that circumscribed space they purpose to put three water-closets. There are difficulties about the case of air as distinguished from that of light. But the Court has interfered to prevent the obstruction of all circulation of air; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this Court will recognize on the ground of nuisance."

Hall v. Lichfield Co. In *Hall v. Lichfield Co.* (*r*) the plaintiff, who had for thirty years enjoyed a free access of air to his slaughter-house through two apertures, brought an action for the obstruction of this air. Fry, J., said that the right to have an access of air to an aperture in the building could undoubtedly be acquired at law, and that for this purpose the Court would imply a covenant. In the case of a dwelling-house the covenant to be implied would be not to interrupt the free use of salubrious air. In the case of a slaughter-house the covenant to be implied would be not to interrupt the free access of air suitable for a slaughter-house.

Right to defined air may be claimed by prescription. In the last-mentioned case, Fry, J., said that the right to defined air could not be claimed by grant, and therefore not by prescription; and he referred to the words of Littledale, J., in *Moore v. Rawson* (*s*) to the effect that such a right more properly arises by covenant. It would seem, however, that a right to the passage of defined air is a negative easement, or a right *ne facias*; and as such may be the subject of a grant, and therefore claimable by prescription (*t*).

481; 59 L. J. Q. B. 574, where the plaintiff succeeded in establishing a prescriptive right to ventilate the cellar by a shaft communicating with a disused well. See also *Moseley v. Bland*, 2 Roll. Abr. 141, Nusans, G. Pl. 16, cited in *Aldred's Case*, 1611, 9 Rep. 58; *Aldin v. Latimer*, 1894, 2 Ch. 446; 63 L. J. Ch. 601; *Chastey v. Ackland*, 1895, 2 Ch. 402; 64 L. J. Q. B. 523; *Cable v. Bryant*, 1908, 1 Ch. 264; 77 L. J. Ch. 78. It is not sufficient for the plaintiff to prove only a

casual and temporary obstruction depending on the direction of the wind (*Johnson v. Wyatt*, 1863, 2 D. J. & S. 26; 33 L. J. (N. S.) Ch. 394).

(*p*) 1862, 8 Jur. N. S. 987; 131 R. R. 804.

(*q*) 1866, 2 Eq. 238; 35 L. J. Ch. 555.

(*r*) 1880, 49 L. J. Ch. 655.

(*s*) 1824, 3 B. & C. 140; 3 L. J. K. B. 32; 27 R. R. 375.

(*t*) See *Dalton v. Angus*, 1881, 6 App. Cas. 794, 823; 50 L. J. Q. B. 689; *Eccl. Commrs. v. Kino*, 1880,

It was at one time suggested that a right to the access of air was not an easement within s. 2 of the Prescription Act (*u*). Where, however, the right is claimed through a definite aperture or through a definite channel, it seems that it may be an easement within s. 2 (*c*).

On the principle that a grantor may not derogate from his grant, it has been held that where land is expressly granted for carrying on a particular business the grantor cannot interrupt air so as to interfere with that business (*y*). Similarly, where there was an express grant of land with a stable on it (which stable was ventilated by defined apertures) the grantor could not subsequently erect anything on his adjoining property which by interfering with the air prevented the use of the stable as a stable (*z*).

Derogation
from grant.

It may be observed here that the right to a lateral passage of air, as well as to a flow of water, superadds a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern, possesses to prevent his neighbour transmitting to him air or water in impure condition; this latter right is one of the ordinary incidents of property, requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance. Nuisances arising from the pollution of air are discussed in a later chapter.

Right to prevent access of impure air not an easement.

In *Curriers' Co. v. Corbett* (*a*), it was argued, from air not being mentioned in s. 3 of the Prescription Act, that the custom of London, as to building on an ancient foundation, was not affected by it so far as it related to the obstruction of air, and a formal objection was made to a decree of the Vice-Chancellor for an injunction on this ground. Turner, L.J., said that he should not be disposed to come to any decision upon it without some further evidence of the custom of the city extending to air, as well as light, of which there was no evidence. See, too, *Dickinson v. Harbottle* (*b*).

14 Ch. D. 221; 49 L. J. Ch. 529. If the negative easement were created by covenant, the covenant would operate as a grant.

(*u*) *Chasteley v. Ackland*, 1895, 2 Ch. 402; 64 L. J. Q. B. 523. See *Webb v. Bird*, 1861-3, 10 C. B. N. S. 268; 30 L. J. C. P. 384; 128 R. R. 707.

(*x*) *Simpson v. Godmanchester*, 1897, A. C. 709; 66 L. J. Ch. 770; *Dalton v. Angus*, 1881, 6 App. Cas. 798; 50 L. J. Q. B. 689. See *Bass v. Gregory*, 1890, 25 Q. B. D. 483; 59 L. J. Q. B. 574; *Harris v. De Pinna*, 1886, 33 Ch. D. 251; 56 L. J. Ch. 344.

(*y*) *Aldin v. Latimer*, 1894, 2 Ch. 437;

63 L. J. Ch. 601.

(*z*) *Cable v. Bryant*, 1908, 1 Ch. 259; 77 L. J. Ch. 78. Compare the cases where premises were demised for occupation, and claims were subsequently made against the landlord for interfering with the access of air to the chimneys (*Tibb v. Carr*, 1900, 1 Ch. 642; 69 L. J. Ch. 282; *Davis v. Town Properties*, 1903, 1 Ch. 797; 72 L. J. Ch. 389; cases of covenants for quiet enjoyment), or for interfering with privacy (*Browne v. Flower*, 1911, 1 Ch. 319; 80 L. J. Ch. 181).

(*a*) 1865, 11 Jur. N. S. 719.

(*b*) 1873, 28 L. T. 186.

CHAPTER V.

NATURE AND EXTENT OF RIGHTS OF WAY.

RIGHTS of way are at once the most familiar and important of the class of affirmative easements which impose upon the owner of the servient tenement the obligation to submit to something being done within the limits of his own property.

Nature of
rights of
way.
Different
kinds of ways.

Rights of this nature are, in their exercise, intermittent, falling within the division of discontinuous easements already alluded to. These rights are in their extent susceptible of almost infinite variety : they may be limited as to the intervals at which they may be used—as a right to be exercised during daylight (*a*), or as a way for a person to carry away his tithe (*b*), or as a way to church (*c*). Again, they

(*a*) *Collins v. Slade*, 1874, 23 W. R. 199.

(*b*) *James v. Dods*, 1834, 2 Cr. & M. 266; 3 L. J. (N. S.) Ex. 47.

(*c*) *Viner's Abr. Nuisance*, H., 15, citing 20 Ass. 18; 33 H. 6, 26.

The Year Books cited in *Viner* relate to a private way to a church appurtenant to the house of a parishioner, and to the same effect is *Brooke's Abr. Chimyne*, pl. 2, cited *Com. Dig. Chimin. D. 2*.

But there may, it seems, be another description of way to a church for all the inhabitants of the parish by custom (see above, p. 4). To this description of way the following authorities refer:—*F. N. B.* 183, n. (427). A man shall not have a writ of assize of nuisance for a way to a church, because he has no freehold in the church. 4 Edw. 3, Nuisance, 8. *Hill v. Bedoe*, 16 James, 2 Rol. Rep. 41; 2 Rol. Abr. 287, Prohibition, F., pl. 48; *Vin. Abr. Prohibition*, F., pl. 48, between the churchwardens of Bithorne and Bowe. The churchwardens sued in the spiritual Court for a way to the church, which they claimed to appertain to all the parishioners by prescription. The defendant denying the prescription, a prohibition was granted (*Smith v. Bennett*, 15 Car., March, 45, pl. 70; 2 Rol. Abr. 286, Prohibition, F. 47; *Vin. Abr. Prohibition*, F. 47). *Brackley and Cooke* said a libel may be in the ecclesiastical

Court for not repairing a way that leadeth to a church, but not for not repairing a highway. These cases are referred to by *Ayliffe* (Par. 438) and *Gibson* (Cod. 293) as authorities that the right to a church path, or the obligation to repair it, are within the jurisdiction of the ecclesiastical Court (see also *Walter v. Montague*, 1 Curt. 261; 1 Burn, Ecc. Law, 395). In *Austin's Case* (H. 23 & 24 Car. 2; 1 Vent. 189) Lord Hale says: "If a way lead only to a church, to a private house or to fields, 'tis a private way." In *Thrower's Case* (P. 24 Car. 2; 1 Vent. 208) the defendant was indicted for stopping a common footway to the church at Whitby. It was objected that an indictment would not lie for a nuisance to a church path, but suit might be in the ecclesiastical Court, and that the damage was private and concerned only the parishioners. Lord Hale says, if this were a common footway to the church for the parishioners, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits. See also per *Dodderidge, J.*, *Sury v. Pigott*, 1625, 3 Bulst. 340; and per *Willes, C.J.*, *Drake v. Wiglesworth*, *Willes*, 658. Referring to these cases, it is said in *Bac. Abr. (Highways. A.)* that a way to a parish church, or to the common fields of a town or to a village which terminates

may be limited as to the actual extent of user authorized—as a foot-way, horse-way, carriage-way, or drift-way. Or they may be limited as to the purposes for which they may be exercised; thus there may be a way for agricultural purposes only (*d*), or for the carriage of coals only (*e*), or for the carriage of all articles except coals (*f*). The civil law also recognized the validity of such modified rights (*g*).

Rights of way are usually acquired by user or by grant express or implied. In the former case, as the user is not continuous and may vary at different times, great difficulties are presented both in law and in fact in determining the amount of right conferred by it; though the maxim, "Omne majus continet in se minus," seems equally applicable here as in other cases. The real difficulty is to

Different kinds of ways.

there, may be called a private way, because it belongs not to all the king's subjects, but only to the particular inhabitants of such parish, house, or village, each of whom, as it seems, may have an action for a nuisance therein. But in *Finnor v. Hoocenden* (Cro. Eliz. 664), where a way was claimed for all the inhabitants of the city of Canterbury, it was held that without a special grief shown by the plaintiff an action lies not, and a case of *Westbury v. Powell* is there referred to of an action having succeeded by an inhabitant of Southwark for an obstruction of a watering-place common to the inhabitants of Southwark.

On the authority of this case of *Westbury v. Powell* it was held in *Harrop v. Hirst*, 1868, L. R. 4 Exch. 43; 38 L. J. Ex. 1, that the plaintiffs, who, in common with other inhabitants of a district, enjoyed a customary right to have water from a spout for domestic purposes, were entitled to an action for diverting the water without proof of special damage.

A right of way cannot be claimed by parishioners by dedication within time of memory. In *Bermondsey v. Brown*, 1865, 1 Eq. 215, Romilly, M.R., says: "I do not doubt a parish might possess as private property a right of way as this ten-foot way in the same manner as they might possess a field, but it must be by grant from the owner of it; neither do I doubt that, if such a use was conferred on the parishioners, a dedication to the public would not be presumed without cogent evidence. A dedication to the parish by the owner of the soil cannot be presumed. A dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants

of a particular parish. This is laid down in *Poole v. Huskinson*, 1843, 11 M. & W. 827; 63 R. R. 782, and is unquestionable law." See, further, *Farquhar v. Newbury*, 1909, 1 Ch. 16, 19; 38 L. J. Ch. 170. *Mounsey v. Ismay*, 1863, 1 H. & C. 729; 34 L. J. (N. S.) Ex. 52, is an authority that such a way may be claimed by immemorial custom, but not by prescription under the Prescription Act (3 H. & C. 486).

Interference with a pathway forming part of the parish churchyard is actionable in the ecclesiastical Court, and the High Court will not entertain jurisdiction (*Batten v. Gedye*, 1889, 41 Ch. D. 507; 58 L. J. Ch. 549).

(*d*) *Reignolds v. Edwards*, 1741, Willes, 282.

(*e*) *Leson v. Moore*, 1700, 1 Ld. Raym. 486; S. C. 1 Salk. 15.

(*f*) *Stafford v. Coyney*, 1827, 7 B. & C. 257; 5 L. J. K. B. 285; 31 R. R. 186. See also *Jackson v. Stacey*, 1816, Holt, N. P. C. 455; 17 R. R. 663; *Tomlin v. Fuller*, 1681, 1 Mod. 27; *Bidder v. North Staffordshire R. Co.*, 1878, 4 Q. B. D. 412; 48 L. J. Q. B. 248.

(*g*) *Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, (vel non agatur,) veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur, aut carbo portetur. Intervalla dierum et horarum non ad temporis causam sed ad modum pertinent jure constitutæ servitutis.*—Dig. 8. 1. 4. §§ 1. 2. de serv.

Usus servitutum temporibus secerni potest; fortè ut quis post horam tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur.—Ib. 5, § 1

Different
kinds of ways.

ascertain what constitutes the relative majus and minus in rights of this nature. A man may allow the passage of foot passengers and carriages near his house, and yet refuse permission to drive cattle along the same road.

Coke's
division
of ways.

Lord Coke, citing the authority of Fleta and Bracton (*h*), says : " There are three kinds of ways : first, a foot-way, which is called *iter*, quod est jus eundi vel ambulandi homini ; and this was the first way. The second is a foot-way and a horse-way, which is called *actus*, ab agendo ; and this vulgarly is called pack and prime way, because it is both a foot-way, which was the first or prime way, and a pack or drift way also. The third is *via*, or *aditus*, which contains the other two, and also a cart-way, &c. ; for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi* " (*i*).

The distinctions here taken by Lord Coke, which, in the terms used at all events, correspond with the definitions of the civil law, appear to be of no practical utility. If this division into three classes were rigorously observed, the second comprehending the rights peculiar to the first class, and the third those both of the second and first, it is obvious that the establishment of a right to do any one of the things comprised in a superior class would at the same time establish a right to do, not only all the acts comprised in the inferior classes, but also all the other acts comprehended in that class of which it forms but a single instance. But such is clearly not the case by the law of England, in which it has been expressly decided that a right which, adopting Lord Coke's definition, is of the highest class, as, for instance, a right to drive carts, does not of necessity include the right to drive cattle, ranged by him in the subordinate class (*k*).

Although Lord Coke has made use of the same terms as the civil law in distinguishing the several kinds of way, yet he appears by no means to have attached the same meaning to them. Thus, the *jus eundi* of the civilians, comprised in the first class, included the right of riding on horseback as well as that of walking (*l*) ; the *actus* also appears to be more extensive, as comprising a right of passage for

(*h*) Co. Litt. 56 a.

(*i*) The text of the civil law is as follows :—*Iter* est jus eundi ambulandi homini, non etiam jumentum agendi (vel vehiculum). *Actus* est jus agendi vel jumentum vel vehiculum. Ita qui habet *iter*, *actus* non habet ; qui *actus* habet, et *iter* habet, (eoque uti potest,) etiam sine jumento. *Via* est *jus eundi et agendi et ambulandi* ; nam et *iter* et *actus* *via* in se continet.—Inst. 2, 3,

præf.

(*k*) *Ballard v. Dyson*, 1808, 1 Taunt. 279 ; 9 R. R. 770 ; *Cowling v. Higginson*, 1838, 4 M. & W. 250 ; 7 L. J. (N. S.) Ex. 265 ; 51 R. R. 555 ; *Higham v. Rabett*, 1839, 5 Bing. N. C. 622 ; S. C. 7 Scott, 827 ; 50 R. R. 811.

(*l*) *Iter* est enim qua quis pedes vel eques commcare potest.—Dig. 8, 3, 12, de serv. præd. rust.

some species of carriage (*vehiculum ducere*), though in what precise manner this right was to be exercised appears to be doubtful (*m*); as, unless some restriction is put upon this right, great difficulty must exist in ascertaining the precise distinction between *actus* and *via*. Different kinds of ways.

To remove this difficulty, one commentator (*n*) has suggested that "the *actus* gave a right of passage only to a small cart or other vehicle drawn or pushed by the hand," thus making the distinctions of the civil law more in accordance with those laid down by Lord Coke.

Lord Stair in his "Institutes," after remarking that by the civil law the greater right of way comprehends the lesser, says: "Our custom sticketh not to this distinction, but measureth the way according to the end for which it was constituted, and by the use for which it was introduced, as having only a foot road, or a road for a horse, to be led or ridden upon, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly" (*o*). Lord Stair.

Probably the true view is *that there is no positive division of rights of way into distinct classes*. Where the extent of the right is to be inferred from user, it is for the jury, or, in the absence of a jury, the Court exercising the functions of a jury, to say, under all the circumstances attendant upon the user, *what is the right*. Where the right is conferred by deed, the deed itself must be looked to for the same purpose. Indeed, in the civil law, from which the earlier writers have adopted their technical terms, it would appear there was no rigorous classification of rights of way, unless the very terms "*iter, actus* or *via*," to which a particular meaning was attached, were adopted. The qualifications of ways seem to have been as numerous as in the English law, *ex. gr.* what kind of vehicle should be used or prohibited; that the way should only be used with a horse, or that a fixed weight or a particular commodity only should be conveyed, &c. So also it might be granted to be enjoyed only at certain days or hours (*p*).

(*m*) *Actus vero ubi et armenta trahere et vehiculum ducere liceat.*—*Ib.*

Qui *actum* habet, et *plaustrum* ducere et *armenta* agere potest.—*Ib.* 7.

(*n*) *Bynkershoek*.

(*o*) Book H., tit. 7, § 10. As to the accommodation of a prescriptive right to new inventions, see the judgment in *Dyce v. Hay*, 1 Macqueen, 312; also the judgments in *Mercer v. Denne*, 1904, 2 Ch. 553; 74 L. J. Ch. 71; 1905, 2 Ch. 581; and *A.-G. South Nigeria v. John*

Holt, 1915, A. C. 617; 84 L. J. P. C. 98.

(*p*) *Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, vel non agatur, veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur, aut carbo portetur.*—Dig. 8, 1, 4, § 1, De serv. *Usus servitutum temporibus secerni potest: forte, ut quis post horam tertiam usque in horam decimam eo jure utatur, vel, ut alternis diebus utatur.*—*Ib.* 5, § 1.

Different
kinds of
ways.

There may be both a private right of way and a public highway over the same road (*g*). A private right of way is not necessarily destroyed either by the public acquiring a right of way over the same road (*r*) or by a public highway over the same road being extinguished (*s*).

The right of a person who has land abutting on a public highway to pass from one to the other is incontrovertible (*t*). It is a private right (*u*), quite different from such a person's individual interest in the public right of using the highway (*x*). He could sue in respect of this private right without joining the Attorney-General (*y*). This private right must be reasonably exercised (*z*); but it may be a proper exercise of the right that a man should at reasonable times and to a reasonable extent take vehicles across a footpath at the side of the metalled highway (*a*).

Extent of
rights of
way.

In ascertaining the extent of a right of way a distinction (as mentioned above) is made between rights of way acquired by user and rights of way acquired by grant (*b*).

A. *Decisions as to the Extent of Rights of Way acquired by User.*

Decisions as
to way
acquired by
user.

The general rule as to these rights is that where a right of way is acquired by user the extent of the right must be measured by the extent of the user (*c*). The following decisions relate to these rights:—

Ballard v.
Dyson.

In *Ballard v. Dyson* (*d*), which was an action of replevin, the defendant avowed taking a heifer damage feasant, and issue was joined upon a plea in bar of “a right of way to pass and repass with cattle from a public street through and along a certain yard and way adjoining to the said place, in which, &c., towards and unto certain premises in the plaintiff's occupation as appurtenant thereto.” On

(*g*) *Brownlow v. Tomlinson*, 1840, 1 Man. & G. 484; *A.-G. v. Esher Co.*, 1901, 2 Ch. 647; 70 L. J. Ch. 808; *Pullen v. Deffell*, 1891, 64 L. T. 134.

(*r*) *Duncan v. Louch*, 1845, 6 Q. B. 904; 14 L. J. Q. B. 185; 66 R. R. 592; *R. v. Chorley*, 1848, 12 Q. B. 515; 77 R. R. 330.

(*s*) *Wells v. London and Tilbury Co.*, 1877, 5 Ch. D. 126.

(*t*) *Burgess v. Northwich*, 1880, 6 Q. B. D. 275; 50 L. J. Q. B. 219; *Marshall v. Ulleswater*, 1871, 7 Q. B. 172; 41 L. J. Q. B. 41; *Ramuz v. Southend Board*, 1892, 67 L. T. 169.

(*u*) *Chaplin v. Westminster*, 1901, 2 Ch. 329; 70 L. J. Ch. 679.

(*x*) *Ibid.*; *Lyon v. Fishmongers' Co.*,

1876, 1 App. Cas. 676; 46 L. J. Ch. 68; *Fritz v. Hobson*, 1880, 14 Ch. D. 554; 49 L. J. Ch. 735.

(*y*) *Boyce v. Paddington*, 1903, 1 Ch. 114; 72 L. J. Ch. 28.

(*z*) *A.-G. v. Brighton Association*, 1900, 1 Ch. 276; 69 L. J. Ch. 204.

(*a*) *Tottenham v. Rowley*, 1912, 2 Ch. 644; 1914, A. C. 95.

(*b*) *Williams v. James*, 1867, L. R. 2 C. P. 581; 36 L. J. C. P. 256; *United Land Co. v. G. E. R.*, 1875, 10 Ch. 590; 43 L. J. (N. S.) Ch. 363.

(*c*) *Finch v. G. W. R.*, 1879, 5 Ex. D. 258.

(*d*) 1808, 1 Taunt. 279; 9 R. R. 770.

the trial it appeared that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years ; that the folding-doors of it opened, not to the plaintiff's yard, but to a high-way ; for many years it had been converted to the purposes of a stable ; the last preceding occupier, who was a pork butcher, had used it as a slaughter-house for slaughtering his hogs ; and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage bounded by a row of houses on each side, the doors of which opened into it : when a cart and horse was driven through it, the foot passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses ; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house : and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to this barn, where he kept his cart ; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there ; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. The defendant produced no evidence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way ; he admitted that there was sufficient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built.

Extent of
rights of way
acquired
by user.

*Ballard v.
Dyson.*

For the plaintiff it was contended that a right of way for all manner of carriages necessarily included a right of way for all manner of cattle ; and therefore proved the prescription.

Mansfield, C.J., told the jury, that inasmuch as this was a private and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle ; and the degree of inconvenience which would attend the larger grant in this case furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the defendant.

Extent of
rights of way
acquired
by user.

*Ballard v.
Dyson.*

The Court, after taking time to consider, discharged a rule for a new trial. Mansfield, C.J., observed that “in general a public high-way is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from Hawkins only refers to Co. Litt., and the passage in Co. Litt. does not prove that Lord Coke was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord Coke does not seem to touch the question. He refers to Bracton (*e*), who only says ‘there are iter, actus, and via’; but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence, and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to it, which could be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude that, if a butcher could establish a slaughter-house at the inner end of the mews without being indictable for a nuisance, he might, therefore, drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of a larger

(*e*) Lib. 4, fol. 232.

grant. The defendant was the proprietor of all these houses. My brother Chambre mentioned the case of a public way, restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that of which he must already be conscious : he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my brother Chambre is of a different opinion ; but I incline to hold that the verdict ought not to be disturbed."

Extent of
rights of way
acquired
by user.

*Ballard v.
Dyson.*

Heath, J. : " This is a prescription for a way for cattle, and a carriage way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in *Rastal* and *Clift*, the pleadings are very particular in stating their claims. In *Rastal*, *tit. Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighbourhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand."

Lawrence, J. : " I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant : the question then is, what was the grant in this case ? That is to be collected from the use ; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. *Co. Ent.* 5, 6. *Quod permittat ad carriandum et recarriandum blada, fœnum, et fimum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia*

Extent of
rights of way
acquired
by user.

*Ballard v.
Dyson.*

et omnimoda averia sua. The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way ; the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle ; for till they were driven there, no opposition could be made, nor the limitation of the right shown ; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages have always some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way ; but if the cattle are driven forward serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

Chambre, J. : " I think there ought to be a new trial ; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way ; but I think it is *primâ facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant, which accounts for the variety in the entries. But it rests with the grantor to prove the restriction of the grant ; otherwise it must be intended to be of the usual extent. This inconvenience indeed may occur from such a determination, that, if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction ; and the inconvenience would be of small extent ; for I believe the cases are very few where a carriage-way has not been accompanied with this right. There seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen, and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way. If the burthen of the proof lies on the *tertenant*, it certainly is possible that he may lose the right of restraining the way ; but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant.

I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands? Is it contended, for instance, that no ancient private way in the kingdom can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns: may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his ancient right of way."

Extent of rights of way acquired by user.

Ballard v. Dyson.

Assuming this case to have been properly decided, it would appear that, in the English law, a right of way of any one kind does not of necessity include any other kind. Supposing the question to arise upon the record, a plea of a right of way to drive carts or carriages would be no answer to an alleged trespass in riding on horseback across a man's land: or, if pleas were framed strictly in accordance with the facts in *Ballard v. Dyson*, a plea of a right of passage for carts would be no justification to a trespass committed by driving cattle. Assuming this to be correct, a further question of considerable difficulty arises, "whether proof of the user of any one kind of way may be evidence of a right of any other kind"; or whether, to use the words of Chambre, J., in *Ballard v. Dyson*, "it would be necessary to drive every species of cattle in order to preserve the right of passing with that species."

One kind of right of way does not of necessity include another kind.

Can proof of one right be evidence of another?

On the authority of *Ballard v. Dyson*, proof of one right cannot afford more than presumptive evidence of another of equal or inferior degree, even if it go to that length, and evidence would be admissible of circumstances rebutting such presumption, such as in that case was given of facts showing the improbability of a grant for the

Extent of rights of way acquired by user.

Can proof of one right be evidence of another ?

passage of horned cattle along the road in question ; and supposing that it does amount to this presumption, it must follow, that the onus probandi of showing the restriction will lie upon the party seeking to rebut the presumption. But in practice it is hardly to be expected that the question will ever be raised by the mere naked proof of a right of superior degree ; as it is probable, that in proving the more extended right, the whole of the facts connected with the case would be given in evidence, some of which, as in *Ballard v. Dyson*, may afford grounds for a verdict of the jury finding the restricted right.

Heath, J., and Lawrence, J., were, as has already been seen, of opinion that proof of use of a cart may afford no evidence of a way for cattle. The former, indeed, lays it down that “a carriage-way includes a horse-way, but not a drift-way” ; while the latter seems to have proceeded on the general ground that, a grant not being shown, the extent of the right could only be shown from the use, from which he inferred that proof of a use of a carriage-way and of a way for pigs afforded no evidence of a way for horned cattle.

Supposing such qualifying circumstances to appear in evidence on either side, it would be a question for the jury to say whether the presumption of law, as to the superior including the equal and inferior class of easements, was rebutted by the evidence laid before them. With reference to this question, it might be important to show what had been the conduct of the parties in modern times : even modern user of the right claimed, if unobjected to, though not of itself sufficient to confer the right, would be obviously corroborative of the presumption of law.

It has, however, been seen, that in the civil law the superior class of easements comprehended the inferior (*f*) ; and unless the authority of Lord Coke as to the classification above given is to be altogether repudiated, it seems impossible not to admit a similar rule into the English law, at least to the extent of raising a presumption that an easement of the superior class includes those of an equal or inferior degree, until the inference is rebutted by evidence : those of an equal degree, because the proof of one right is evidence of the whole class to which it belongs ; those of an inferior, as naturally comprised in the more extensive right.

Upon the general principle that every easement is a restriction of the rights of property of the party over whose lands it is exercised,

Semble. Proof of higher right is presumptive evidence of right of equal or inferior degree.

Suggested rule.

(*f*) Ante, p. 314. Julianus refert eum qui actum stipulatus postea iter stipulatur, posteriore stipulatione nihil

agere ; sicuti qui decem deinde quinque stipulatur.—Vinnius, lib. 2, tit. 3, de serv. rust. 4.

the real question appears to be, under the peculiar facts of each case, whether proof of a right has been given co-extensive with that amount of inconvenience sought to be imposed by the right claimed. Upon this doctrine the classification of rights of way appears to depend, which assumes that the rights of each class impose an equal amount of inconvenience on the property subject to them. It is obvious that, in some cases, a right to drive cattle might be productive of greater inconvenience than a right to drive carts, and vice versa. It will, therefore, be for the jury to infer the extent of the supposed grant from the actual amount of injury proved under all circumstances attending it. If it appeared that the way had been used for all the purposes required by the claimant, there would be strong evidence of a general right; while, on the other hand, proof that the party, having occasion for a particular way, had not made use of the way in question, would be almost conclusive evidence that he had not a right of way for that particular purpose.

Extent of rights of way acquired by user.

Extent of right a question for the jury.

This doctrine is supported by *Cowling v. Higginson (g)*, which was an action of trespass; which the defendant justified under a plea of right of way for horses, carts, waggons, and carriages. It was held that proof of user for farming purposes did not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land.

Cowling v. Higginson.

In the course of the argument Lord Abinger observed: "The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer a right for all purposes. Using a road as a footpath would not prove a general right, nor proof that a party had used a road to go to church only. Some analogy should be shown between farming and mining purposes." And Parke, B., said: "If it had been shown, that from time immemorial it had been used as a way for all purposes that were required, would not that be evidence of a general right of way? If they show that they have used it time out of mind for all the purposes that they wanted, it would seem to me to give them a general right. You must generalize to some extent. If your argument is to be taken strictly, it must be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or the loading, or the purpose for which it was used."

Parke, B., in his judgment said: "To make out this plea, it is

(g) 1838, 4 M. & W. 245; 7 L. J. (N. S.) Ex. 265; 51 R. R. 555.

Extent of
rights of way
acquired
by user.

Cowling v.
Higginson.

necessary to show an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes *as of right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalize to some extent, and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury."

Higham v.
Rabett.

The correctness of this doctrine was also recognized in *Higham v. Rabett* (*h*), where a finding by the jury of a right of way for the purpose of carting timber did not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively on the issue joined on the plea.

Effect of
change in
dominant
tenement.

In the case of rights of way acquired by user, questions have been raised as to the effect of a change in the dominant tenement. Where a right of way to a field had been acquired by user, it was laid down by Willes, J., that the user of the right must be a reasonable use for the purposes of the land in the condition in which it was while the user took place (*i*). Similarly a prescriptive right of way acquired by agricultural purposes only did not give a right of way for mineral purposes (*k*), nor a right to cart building materials (*l*).

Wimbledon
Conservators
v. Dixon.

In *Wimbledon Conservators v. Dixon* (*m*), where the user proved

(*h*) 1839, 5 Bing. N. C. 622; S. C. 7 Scott, 827; 50 R. R. 811. Cf. *Dare v. Heathcote*, 1856, 25 L. J. (N. S.) Ex. 245, affirmed in error, 36 L. J. Ex. 164; *Hollins v. Ferny*, 1884, 13 Q. B. D. 304; 50 L. J. Q. B. 430.

(*i*) *Williams v. James*, 1867, L. R. 2 C. P. 582; 36 L. J. C. P. 256. It has been suggested that this rule may have

been modified by recent decisions: see *Bailey v. Holborn and Finsbury*, 1914, 1 Ch. 601; 83 L. J. Ch. 515. And see the cases discussed post, p. 328.

(*k*) *Bradburn v. Morris*, 1876, 3 Ch. D. 812.

(*l*) *Wimbledon Conservators v. Dixon*, 1875, 1 Ch. D. 362; 45 L. J. Ch. 353.

(*m*) 1875, 1 Ch. D. 362; 45 L. J. Ch.

was a user for farming purposes only, —except for two or three slight circumstances, the enlargement of a farm-house, the replacing of a mud cottage by a brick cottage, and apparently the taking away of gravel,—the Court declined to presume a grant of a way for all purposes, and an injunction against carting building materials was granted. The Lords Justices, affirming Jessel, M.R., held that the property could not be so changed as substantially to increase or alter the burden upon the servient tenement; and Mellish, L.J., expressed an opinion that Parke, B., when giving judgment in *Cowling v. Higginson* (*n*), had not present to his mind the question of a change in the dominant tenement. He preferred the language of Lord Abinger.

Extent of rights of way acquired by user.

Where, however, a right of way to a dwelling-house had been acquired by user, there was no excess of user by opening a small shop (*o*).

In *Milner v. G. N. and City Railway* (*p*) the question arose as to the extent of a way to be implied over a common passage which ran along the backs of certain houses into a side street. The plaintiffs were the owners of two of these houses, deriving title under one limitation in the will, and the defendants were the owners of the site of two other of the houses, deriving title under another limitation. The will contained no express provision as to any rights of way over the passage. The defendants pulled down the houses on their land and constructed a railway station, having one of its entrances opening into the passage, which they claimed to use as a thoroughfare for their passengers. Kekewich, J., after dealing with the evidence as to user at the dates of the will and of the death of the testator, and also in later years, and coming to the conclusion that the user had throughout been for domestic and ordinary business purposes, held that the defendants' right of way over the passage extended only to user for those purposes.

Ways acquired by implied grant.

Milner v. G. N. and City Railway.

So, where the way is of necessity, the extent of user acquired is limited by the necessity which exists at the time of the implied grant (*q*), or which is created by the purpose for which the conveyance is taken (*r*).

353. Cf. the dicta in *Williams v. James*, 1867, L. R. 2 C. P. 577; and of North, J., in *New Windsor v. Stovell*, 1884, 27 Ch. D. 665, at p. 672; 54 L. J. Ch. 113.

(*n*) Above, p. 323.

(*o*) *Stown v. Holliday*, 1874, 30 L. T.

(*p*) 1907, 1 Ch. 208; 75 L. J. Ch. 807.

(*q*) *London v. Riggs*, 1880, 13 Ch. D. 798; 49 L. J. Ch. 297.

(*r*) *Serff v. Acton*, 1886, 31 Ch. D. 679; 55 L. J. Ch. 569.

Extent of
rights of way
acquired by
express
grant.

B. *Decisions as to the Extent of Rights of Way acquired by Express Grant.*

In the case of a grant the language of the instrument can be referred to. It is for the Court to construe that language, and, in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against a grantor must be applied (*s*). In particular, in construing a grant the Court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used (*t*).

*Cannon v.
Villars.*

In *Cannon v. Villars* (*u*) the Court was considering the extent of an implied right of way arising under an agreement to grant a lease of premises for the purpose of a business. And in the course of his judgment, Jessel, M.R., laid down rules on the above points as follows: "The construction of the grant will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the locus in quo over which the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used. Where you find a road constructed so as to be fit for carriages and of the requisite width, leading up to a dwelling-house, and there is a grant of a right of way to that dwelling-house, it would be a grant of a right of way for all reasonable purposes required for the dwelling-house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling-house if he wanted to take the air, or the right to have a waggon drawn up to the door

(*s*) *Williams v. James*, 1867, L. R. 2 C. P. 581; 36 L. J. C. P. 256. See *Wood v. Saunders*, 1875, 10 Ch. 584 n.; 44 L. J. (N. S.) Ch. 514.

(*t*) See *Cannon v. Villars*, *infra*, and *Sketchley v. Berger*, 1894, 69 L. T. 754.

(*u*) 1875, 8 Ch. D. 415, 420; 47 L. J. Ch. 597.

when the waggon was to bring coals for the use of the dwelling-house. Again, if the road is not to a dwelling-house but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a grant of right of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and waggons at reasonable times for the purpose of the business. That again would afford an indication in favour of the extent of the grant. If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five feet wide, over which a waggon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances showed that the right of way was a right for foot-passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course where you find restrictive words in the grant, that is to say, where it is only for the use of foot-passengers, stated in express terms, or for foot-passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law. *Primâ facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot-passengers, or restricted to foot-passengers and horsemen or cattle, which is generally called a drift-way, or a general right of way for carts, horses, carriages and everything else."

Extent of rights of way acquired by express grant.

As in the case of rights of way acquired by user, so in the case of rights of way acquired by express grant, questions have been raised as to the effect of a change in the dominant tenement. And it is a difficult question how far a right of way expressly granted is limited by the nature, or by the user at the time of the grant, of the tenement to which it is annexed (*x*). On the one hand, it is said that the grantor looks only to the actual user of the dominant tenement, and that to alter the user is to increase the burden of the easement. On the other hand, it is argued that, if it were intended to limit the

Effect of change in the dominant tenement.

(*x*) The question discussed here is purely one of construction. The case of "excess" in the user of a way, as where a right of way to one close is used for the purpose of access to another

close lying beyond it and in the possession of the same person, is discussed below, p. 333. A similar question affecting ways of necessity was treated in *Gayford v. Moffat*, 1868, 4 Ch. 133.

Effect of
change in
dominant
tenement
where a
way is ac-
quired by
express
grant.

Early
decisions :—
Allan v.
Gomme.

grant, this would be done in express words ; that a grant must be construed against the grantor ; and that a grant in terms general must not be shackled by implied restrictions. The question is often complicated by the terms in which the dominant tenement is described in the grant. In some cases, the purposes to which the tenement is put being referred to, a limitation of the grant is inferred from this reference (*y*).

In *Allan v. Gomme* (*a*), in trespass quare clausum fregit, it appeared that the defendant Gomme, having by express reservation a right of way over the plaintiff's premises to a stable and loft on his own land, and to a "space or opening under the said loft and then used as a wood-house," converted the loft and the space thereunder into a cottage, and claimed to use the way as appurtenant to the cottage. A verdict having been found for the plaintiff, the defendant obtained a rule nisi for a nonsuit, which was discharged by the Exchequer Chamber. The judgment of the Court (*b*) was delivered by Lord Denman, C.J. His Lordship, while conceding that the words "now used as a wood-house" were to be taken merely as ascertaining the place where the open space of ground was, was of opinion that the defendant was confined to the use of the way "to a place which should be *in the same predicament* as it was at the time of the making of the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words 'now used as a wood-house' merely used for the ascertaining the locality and identity of the place called a space or opening under the loft ; and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground. But we think he could only use it for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed. Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that Browne had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages or had built a factory, or established gas works, it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings." The Court referred

(*y*) See *Ardley v. St. Pancras*, 1870, W. N. 201 ; 39 L. J. Ch. 87 ; and compare *Bayley v. G. W. R.*, 1883, 26 Ch. D. 451, 452.

(*a*) 1840, 11 A. & E. 759 ; 9 L. J. (N. S.) Q. B. 258 ; 52 R. R. 492.

(*b*) Lord Denman, C.J., and Little-
dale and Coleridge, JJ.

to *Luttrell's Case* (c), and to the cases where an alteration in a building in respect of which lights were claimed had been held to extinguish the easement (d).

The above case was admittedly one of first impression; and in *Henning v. Burnet* (e) Parke, B., considered that the rule had been laid down too strictly. "No doubt," he added, "if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." In *South Metropolitan Co. v. Eden* (f), Jervis, C.J., made a similar distinction. "If I grant a man a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it. Here the grant is general,—to use the road for the purpose of going to or returning from the land conveyed or any part thereof; it is not defined, as in the case referred to." In *White v. Grand Hotel, Eastbourne* (g), Hamilton, L.J., said that in *Allan v. Gomme* the Court rested their view upon the difference between a change in the substance of the right and a change only in the quality or extent of the enjoyment.

The decision in *Allan v. Gomme* has often been quoted to support the view that the right to use the way is confined to the use of it to the dominant tenement in the condition in which such tenement was at the time of the grant. In later cases, however, the rule has been laid down differently.

Finch v. G. W. R. (h) was a case of award under an Inclosure Act; but here the way in question (twenty feet wide) was to "remain a private carriage-road and drift-way for the use of the respective owners and occupiers for the time being of the allotment over which the same passes, and of several old inclosed meadows and woodlands belonging to [A.], a meadow called Broadmead belonging to [B.], and the said inclosed meadow belonging to [C.] to which the same passes." A part of the "allotment over which the" road "passed," which had been pasture land, was converted by the defendant company into a cattle-pen for storing cattle in transit, the user of the road being much increased; and, an action having been brought, the Court held that the new user could be justified. The Court thought that *Allan v. Gomme* established no general rule, but

Effect of change in dominant tenement where a way is acquired by express grant.
Allan v. Gomme.

Later decisions.

Finch v. G. W. R.

(c) 1738, 4 Rep. 86 a.

(d) Treated below, Part V., Chap. 2.

(e) 1852, 8 Ex. 187, 192; 22 L. J.

(f) 1855, 16 C. B. 42, 57.

(g) 1914, 1 Ch. 117.

(h) 1879, 5 Ex. D. 254.

Ex. 79; 91 R. R. 427

Effect of
change in
dominant
tenement
where a way
is acquired
by express
grant.

Finch v.
G. W. R.

Newcomen v.
Coulson.

turned on the construction of the particular deed referred to ; and that the principle was established " that, where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant."

Newcomen v. Coulson (i) was also the case of an award under an Inclosure Act. And there Malins, V.-C., expressly recognized *Allan v. Gomme* as binding. The award directed that each of the allottees, " and the owner and owners for the time being of the lands hereby to them respectively allotted, shall for ever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle, as often as occasion shall require," over a certain property therein specified ; and that, if the allottees or any of them, or any of the owners for the time being of their respective allotments, should " street out " the way, it should be made eleven yards broad at the least between the quick-sets. The allotments were merely agricultural land. The owners of one of the allotments having commenced to build upon their land a number of villa residences, and to metal the road for the purpose of being used with the residences, the owner of the soil of the road and of the adjoining property interfered, and insisted that the way could not be used except for access to agricultural property. His action, and the appeal, were dismissed. Malins, V.-C., distinguished *Allan v. Gomme*, being of opinion that this was not the case of an easement, but of an arrangement between the owners of the land enclosed for the formation and enjoyment of a way, which meant a way for all purposes. The Court of Appeal repudiated this distinction, and apparently relied on the fact that the way was granted as appurtenant to " land," which meant the land and all buildings from time to time to be erected upon it.

Watts v.
Kelson.

In *Watts v. Kelson* (k) the plaintiff was, by express words contained in the conveyance of his premises, entitled to " a right of way " through the defendant's gateway and close " to a wicket-gate to be erected by the plaintiff leading into the hereinbefore described piece or part of garden ground." The plaintiff's premises contained, besides the garden, a cottage, a number of stalls for feeding cattle, a yard and outbuildings, and a few acres of land. The defendant's

(i) 1876, 5 Ch. D. 133 ; 46 L. J. Ch. 559.

(k) 1870, 6 Ch. 166 ; 40 L. J. (N. S.) Ch. 126.

gate would admit carriages. The plaintiff did not erect a wicket-gate, but erected a cart-shed on the same spot, and brought carts to it. The defendant having obstructed the way, Lord Romilly, M.R., granted an injunction. The defendant contended that the way was granted for so long only as the part of the plaintiff's premises nearest to the proposed wicket-gate should continue to be used as a garden, quoting *Allan v. Gomme* and the other cases; but Lord Romilly, without giving reasons, overruled this contention.

Effect of change in dominant tenement where a way is acquired by express grant.

Watts v. Kelson.

In *White v. Grand Hotel, Eastbourne* (l), where the dominant tenement had been converted from a private dwelling-house into an hotel and the Court had to place a construction upon a verbal grant of a right of way, the Court seemed unwilling to treat *Allan v. Gomme* as a binding authority, but accepted as settled law the principle stated in *Finch v. G. W. R.* (sup., p. 329).

White v. Grand Hotel, Eastbourne.

A similar question has been discussed by the Courts in connection with the user of accommodation works (such as level crossings) constructed by a railway company.

Decisions as to user of accommodation works.

In *G. W. R. v. Talbot* (m) a railway company had entered into an agreement that they would construct and maintain, "for the accommodation of the owners of the lands adjoining the railway," a level crossing for a tramway. At the date of the agreement the owner of the tramway had used it for conveying traffic from his land to a neighbouring port. The defendant, his successor in title, claimed to convey traffic brought on to her land from other places. Kekewich, J., held that, there being nothing in the grant to limit the user, the defendant might use the crossing for any purpose not interfering with the Great Western Railway. The Court of Appeal, however, declared that the defendant was not entitled to use the crossing for the purpose of conveying traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent, as enjoyed at or previous to the date of the agreement, or as since enjoyed, if, owing to acquiescence or otherwise, such subsequent enjoyment was then binding on the railway company. The judgment proceeded upon the intention of the parties at the time when the works were executed.

G. W. R. v. Talbot.

In a subsequent case (n) a level crossing had been made by a railway company to connect lands in a district which was entirely agricultural. Many years later the defendant, who was the owner of the adjoining land, let a field to a tennis club, who used the crossing

Taff Vale Co. v. Gordon Canning.

(l) 1913, 1 Ch. 114, 116; 1913, 835.

W. N. 306; 82 L. J. Ch. 57.

(m) 1902, 2 Ch. 759; 71 L. J. Ch.

(n) *Taff Vale Co. v. Gordon Canning*,

1909, 2 Ch. 48; 78 L. J. Ch. 492.

Effect of change in dominant tenement where a way is acquired by express grant.

Decisions as to user of accommodation works.

Taff Vale Co. v. Gordon Canning.

United Land Co. v. G. E. Rail. Co.

daily in large numbers. The Court declared that the defendant was not entitled to use the crossing as a means of access for the tennis club or otherwise so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the construction of the railway.

In *United Land Co. v. G. E. R. (o)* a railway company had been empowered to make a railway through Crown lands by an Act which required the company to make such convenient crossings where the railway traversed the Crown lands as should, in the judgment of certain Commissioners, be "necessary for the convenient enjoyment and occupation of the lands." In accordance with this provision, the company agreed with the Commissioners to make "four level crossings" at certain specific points, "with proper approaches thereto from the lands on the other side," three of the crossings to be thirty feet wide each, and the remaining one twenty feet wide. The crossings were made substantially in accordance with this agreement. The land in question was, at the date of the Act, marsh or pasture land, and was subject to a statute which prevented building. But, the land having subsequently been sold free from this restriction and advertised for re-sale in building lots, the defendants, successors in title of the original railway company, objected to the crossings being used for access to the houses. The objection was overruled by Malins, V.-C., who distinguished the case before him from the grant of a private right of way on the ground that it was a case of compulsory sale, and that a railway company dividing land into lots was bound to render it as useful for all purposes as if no severance had been made. He thought that the width of the crossing showed that they had not been intended to be used merely for agricultural purposes. The nature of the communications agreed upon had no doubt reduced the amount of compensation paid (*p*). On appeal, the Lords Justices (James and Mellish) affirmed this decision, chiefly for the special reasons given by the Vice-Chancellor. But Mellish, L.J., added some words on the general principle. "No doubt," he said, "there are authorities that, from the description of the lands to which the right of way is annexed and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes; but, if there is no limit in the grant, the way may be used for all purposes."

In *G. W. R. v. Talbot* and *Taff Vale v. Gordon Canning* the level crossings had been constructed under s. 68 of the R. C. C. Act, 1845.

(o) 1873, 17 Eq. 158; 43 L. J. (N. S.) Ch. 363; 1875, 10 Ch. 586.

(p) Cf. *R. v. Brown*, 1867, L. R. 2 Q. B. 630; 36 L. J. Q. B. 322.

And in both these cases the decision in *United Land Co. v. G. E. R.* was treated as turning on the special terms of a very special private Act.

In the above decisions as to the user of the accommodation works the Courts seem to accept the principle that the grantee of the right of way must not substantially increase the burden of the easement. But this must be read in connection with the rule laid down in *Finch v. G. W. R.* (ante, p. 330). And in each case the question must be asked what is the legitimate burden.

According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconvenience imposed upon the servient tenement—e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the limit of the legitimate burden) must, it seems, be ascertained having regard to the intention of the parties at the time when the right was created.

In connection with the doctrine that the burden of a right of way must not be increased, there should be noticed the rule that a right of way to or from Blackacre does not include a right of way to or from a place beyond Blackacre (*q*).

Thus, it is laid down in Rolle's Abridgment, if A. be seised in fee, and grant to B. a right of way to a certain close, B. cannot use that way to go to other closes without first going to the close specified in the grant (*r*). It was said that if a defendant justifies under a right of way from D. to Blackacre, if the plaintiff replied that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, the replication would not support the action, for when he was in Blackacre he might go where he pleased (*s*). But it seems that if a man have a way for carriages from D. to Blackacre over my close, and afterwards he purchase land adjoining to Blackacre, he cannot use the aforesaid way with carriages to the land adjoining, though he go first to Blackacre and from thence to the land adjoining, for this might be greatly prejudicial to my close; but it seems that if I wish to help myself I ought to show this special matter, *and that he uses it for the land adjoining* (*t*).

Effect of change in dominant tenement where a way is acquired by express grant.
Burden of easement must not be increased.

Present rule.

User beyond terminus ad quem.

(*q*) *Colchester v. Roberts*, 1839, 4 M. & W. 774; *Skull v. Glenister*, 1864, 16 C. B. N. S. 81; 33 L. J. (N. S.) C. P. 186.

(*r*) *Chemin private*, A. (Comment

poet estrie use), pl. 1, *Hodder v. Holman*.

(*s*) *Ibid.*, pl. 2, *Saunders v. Mose*. See *Stott v. Stott*, 1812, 16 East, 343; 14 R. R. 354.

(*t*) *Chemin private*, pl. 3, S. C.

User beyond
terminus
ad quem.

Lawton v.
Ward.

In *Lawton v. Ward* (u) the defendant justified under a right of way for carts and carriages to a close called C. The plaintiff replied that the defendant drove the carts to C., and also further to D. The plaintiff upon demurrer to the rejoinder had judgment; and it was resolved "that the defendant had not pursued his prescription, for the prescription is to go to C.; that when he goes to C., and farther to D., he has not authority to do it." And Powell, J., jun., said: "That the difference is, where he goes farther, to a mill or a bridge, there it may be good; for by the same reason, if the defendant purchases 1,000 closes, he may go to them all, which would be very prejudicial to the plaintiff." And for authorities they relied upon 1 Rolle, Abr. 391, pl. 3; 1 Mod. 190 (x); 3 Keble, 348 (y).

Harris v.
Flower.

In *Harris v. Flower* (z) it was claimed that a grant of a right of way to plot A. in favour of the defendants' predecessor in title authorized the use of the way as a means of access to buildings erected, subsequently to the date of the grant, partly on plot A. and partly on plot B., the buildings on plot B. having no means of access except over the way in question. But this claim was disputed. Swinfen Eady, J., before whom the action was tried, treated the question as one of construction, and as being governed by the decisions in *United Land Co. v. G. E. R.* (a), *Newcomen v. Coulson* (b), and *Finch v. G. W. R.* (c). Following those decisions, he held that, the user by the defendants being bonâ fide for the purpose of access to plot A., and none the less so because a portion of the building erected on plot A. extended beyond its boundary, the defendants were entitled to the right claimed by them. But this decision was reversed by the Court of Appeal on the ground that the user claimed by the defendants was in excess of the grant and would increase the burden on the servient tenement. Romer, L.J., referring in his judgment to *Finch v. G. W. R.* (ante, p. 329), said: "That, no doubt, is a case of considerable difficulty—one which is upon the border line. I gather that the judges in that case came to the conclusion that what the railway company were doing was done in substance for the due enjoyment of the dominant land. They were using the dominant land for the purpose of penning cattle, and no doubt the cattle were

(u) 1697, 1 Lord Raymond, 75; S. C., 1 Lutwyche, 111, nom. *Laughton v. Ward*.

(x) *Howell v. King*, 1686.

(y) See *Cowling v. Higginson*, 1838, 4 M. & W. 245; 7 L. J. (N. S.) Ex. 265; 51 R. R. 555; *Dand v. Kingscote*, 1840, 6 M. & W. 174; 9 L. J. (N. S.) Ex. 279; 55 R. R. 560; *Williams v. James*, 1867, L. R. 2 C. P. 577; 36 L. J. C. P. 256;

Bidder v. North Staffordshire Co., 1878, 4 Q. B. D. 412; 48 L. J. Q. B. 248; *Somerset v. G. W. R.*, 1882, 46 L. T. 883.

(z) 1905, 90 L. T. 669; on appeal, 91 L. T. 816; 74 L. J. Ch. 127.

(a) Above, p. 332.

(b) Above, p. 330.

(c) Above, p. 329.

intended ultimately to be sent all over the railway system. But the ground of the decision was that the railway company were entitled to use the dominant land for the purpose of a cattle pen just as they might have erected a slaughter-house upon it. To my mind that case only turned on the question of fact whether what the railway company did was for the enjoyment of the dominant tenement in accordance with the right of way granted."

User beyond terminus ad quem.
Harris v. Flower.

It remains to notice a few cases in which particular grants have been construed by the Courts.

First, as to the persons entitled to use the way.

In *Mitcalfe v. Westaway* (d) a reservation of a right of way to the "assigns" of the grantor was held to operate in favour of his licensees. And in *Barendale v. North Lambeth Club* (e) a grant of a right of way to the grantee, "his executors, administrators, and assigns, under-tenants and servants," was held to extend to all licensees of the grantee lawfully going to and from the dominant tenement. But in *Reynolds v. Moore* (f) a reservation of "free liberty" to the grantor, "his heirs and assigns, and his and their attendants, gamekeepers and servants, to hunt, fowl, fish, hawk, and set" in the demised premises, did not authorize the grantor or his assignee to permit a stranger to shoot, in the absence of the grantor or his assignee. In *Thornton v. Little* (g) the word "visitors" in a grant of a right of way was held to include pupils attending a school carried on upon the dominant tenement. But in *Keith v. Twentieth Century Club* (h) members of a club, whether resident or not, were not "lessees," or "sub-lessees," or "tenants," or "families," or "friends," of the defendants, within the meaning of a grant of the use of a garden containing those words.

Construction of particular grants.
Persons entitled to use a way.

Secondly, as to the mode of user authorized.

Primâ facie the grant of a right of way is a grant having regard to the locus in quo over which it is granted and to the purpose for which it is intended to be used. Both these circumstances may be called in aid in determining whether it is a general right of way or a foot-way or a drift-way (i). On this principle a way was held to be a foot-way in *Cousens v. Rose* (k) and a way for all purposes in *Watts v. Kelson* (l).

Mode of user authorized.

(d) 1864, 34 L. J. C. P. 113; 34 L. J. (N. S.) C. P. 113.

(e) 1902, 2 Ch. 427; 71 L. J. Ch. 806.

(f) 1898, 2 I. R. 641.

(g) 1907, W. N. 68.

(h) 1904, 73 L. J. Ch. 545; 90 L. T. 775; 52 W. R. 554.

(i) *Cannon v. Villars*, 1878, 8 Ch. D. 421; 47 L. J. Ch. 597. See *Osborn v. Wise*, 1837, 7 C. & P. 761; 48 R. R. 846.

(k) 1871, 12 Eq. 366.

(l) 1870, 6 Ch. 166; 40 L. J. (N. S.) Ch. 126.

Construction
of particular
grants.

In *Brunton v. Hall* (m) a reservation in a lease of a right of way on foot, and for horses, oxen, cattle, and sheep, did not give any right of way to lead manure. It was contended, on behalf of the plaintiff, that "to lead manure" might mean nothing more than to carry manure, and that if he had a right of way he might, in the exercise of it, carry burdens. The authorities, however, seem to be much against the proposition, that a right of passage would in general give a right to transport burdens in the several modes in which the right of way might be exercised (n). And it has been held in Ireland that the grant of a right of way on foot does not authorize the grantee to carry burdens not commonly carried by ordinary passengers in the use of a foot-way (o).

It is true that, according to the civil law, a man having the right termed "iter," which was a right to pass on horseback as well as on foot, might be carried in a litter; but he could not drive a beast of burden along the way. So the right termed "actus," which was a right of passage for beasts of burden and carriages, gave no right to pass with waggons. "Qui sella aut lectica vehitur ire non agere dicitur. Jumentum vero ducere non potest, qui iter tantum habet. Qui actum habet, et plaustrum ducere, et jumenta agere potest. Sed trahendi lapidem aut tignum, neutri eorum jus est" (p). It is obvious that to hold that a right of way per se gave a right to carry burdens would impose a much more onerous obligation on the servient owner; for if he wished to build or plant trees on his tenement, he must leave a higher space than he would otherwise be obliged to do. For this reason it was, in the civil law, that the opinion was generally entertained that neither the "iter" nor "actus" gave the right to pass carrying a pole erect. "Quidam nec hastam rectam ei ferre licere; quia neque eundi, neque agendi gratia id faceret, et possunt fructus eo modo lædi" (q).

(m) 1841, 1 Q. B. 792; 1 Gal. & Dav. 207; 10 L. J. (N. S.) Q. B. 258. See also *Durham and Sunderland R. Co. v. Walker*, 1842, 2 Q. B. 963; 57 R. R. 842, as to the use of a railway for other purposes than those for which it was granted.

(n) See *Ballard v. Dyson*, 1808, 1 Taunt. 279; 9 R. R. 770; *Higham v. Rabett*, 1839, 7 Scott, 827; 50 R. R. 811; and particularly *Cowling v. Higginson*, 1838, 4 M. & W. 245; 7 L. J. (N. S.) Ex. 265; 51 R. R. 555; and *Dare v. Heathcote*, 1856, 26 L. J. Ex. 245.

(o) *Austin v. Scottish Widows*, 1881, 8 L. R. Ir. 385.

(p) Dig. 8, 3, 7, de serv. præd. rust.

Pothier, in a note on the term "plaustrum," says: "Id est currum; non verum plaustrum trahendis oneribus aptum."

(q) Dig. 8, 3, 7, de serv. præd. rust. Pothier's note on this passage is as follows: "Quidam jus recte hastæ ferendæ quod in servitute viæ contineri dicitur, in servitute actus non item, ita intelligunt; ut in servitute viæ non solum duntaxat ad certam latitudinem, sed etiam cælum serviat intra eam altitudinem quæ hastæ ferendæ par sit; adeo ut is cui servitus debetur, possit plaustrorum suorum onus usque ad hanc altitudinem exaggerare; ille vero qui eam servitutem debet, non possit in loco per

Under a grant of a free and convenient horse and foot-way, and for carts, &c., "to carry stones, timber, coals and other things whatsoever," the grantee could lay a framed way across the land for carrying coals as being most convenient (*r*). Where in 1630 land was granted excepting and reserving out of the grant all mines of coal with sufficient wayleave to the said mines, the right was not confined to such ways as were in use at the time of the grant (*s*). Where, however, A. granted land reserving a waggon or cart road of the width of eighteen feet to be at all times thereafter kept in repair at his own cost, this reservation did not enable A. to lay down a railroad for carrying coals from his neighbouring colliery (*t*).

In *Midgley v. Richmond* (*u*) general words in an Act of Parliament reserving a wayleave to the Bishop of Durham for coals, &c., gotten out of any lands, were restrained by the context to lands belonging to the see.

In *N. E. R. v. Hastings* (*x*) a specified rent payable by the railway company was reserved to H. on coal carried over any part of certain railways which should be shipped at port B. For more than forty years rent was paid for coal carried over the railways and shipped at port B. when the coal passed over H.'s land, but no rent was paid when it did not pass over H.'s land. In an action by H.'s successor in title against the company the company were liable to pay the rent upon coal carried over any part of the railways, although it did not pass over H.'s land; and the construction was not affected by the fact that the parties had interpreted the words in a sense different from that which the words plainly bore.

In *Selby v. Crystal Palace Co.* (*y*) a covenant that the occupiers of lands conveyed should have the full use and enjoyment of all roads "in as full, free, complete, and absolute a manner to all intents and purposes whatsoever as if the same were public roads" entitled them, not only to the use of the roads for the purpose of transit or for the purposes for which public roads could be used at the date of the deed, but also to rights subsequently granted over public roads,

Construction
of particular
grants.

*N. E. Rail.
Co. v.
Hastings.*

quem via debetur, infra hanc altitudinem quidquam habere; puta deambulationes arboribus opacas, quæ servituti nocerent. Ita Maranus ad h. tit."

(*r*) *Senhouse v. Christian*, 1787, 1 T. R. 560; 1 R. R. 300.

(*s*) *Dand v. Kingscote*, 1840, 6 M. & W. 174; 9 L. J. (N. S.) Ex. 279; 55 R. R. 560; see *Newcomen v. Coulson*, 1877, 5 Ch. D. 139; 46 L. J. Ch. 559; *Durham R. Co. v. Walker*, 1842, 2 Q. B. 940; 57 R. R. 842.

(*t*) *Bidder v. North Staffordshire R.*

Co., 1878, 4 Q. B. D. 412; 48 L. J. Q. B. 248.

(*u*) 1845, 14 M. & W. 595; confirmed by *Headley v. Fenwick*, 1864, 3 H. & C. 349; 140 R. R. 496. Dist. *Chadwick v. Marsden*, 1867, L. R. 2 Exch. 285; 36 L. J. Ex. 177; *Ardley v. Guardians of St. Pancras*, 1870, 39 L. J. Ch. 871.

(*x*) 1900, A. C. 260; 69 L. J. Ch. 516; affirming 1899, 1 Ch. 656.

(*y*) 1862, 35 Beav. 606; 31 L. J. (N. S.) Ch. 595.

Construction
of particular
grants.

Extent of
user
authorized.

e.g., to open them for the purpose of conveying gas to the houses of the occupiers.

Thirdly, as regards the extent of user authorized.

There is this distinction between a private and a public right of way, that the former is not necessarily, as the latter is, over every part of the land along which the right exists (z). The grant of a private right of way along "the passage coloured blue" on a plan confers, it has been said, a *primâ facie* right to the reasonable use of every part of the passage. But an action for disturbance will not lie unless there is a substantial interference with the easement (a). Accordingly, where there was granted to the plaintiff a right to use a forty-foot road, it was held that he could not maintain an action in respect of a portico which projected two feet into the carriage-way, but left ample space for the convenient enjoyment by the plaintiff of the way (b). The question is, can the right of way be substantially exercised as conveniently as before? (c).

In *Strick v. City Offices* (d) the defendants granted to the plaintiffs a lease of offices in a block of buildings. No mention was made in the lease of any right of access from the entrance hall, but it was admitted that the plaintiffs had such right. At the date of the lease the hall was of large dimensions, and the defendants subsequently proposed to diminish the size. The plaintiffs claiming a right of way over every part of the hall, it was held that no such right existed, the plaintiffs being entitled only to a reasonable user. In *Wood v. Stourbridge R. Co.* (e) a grant of a right of way over a road partly formed and partly staked out extended over the whole road formed and unformed. In *Knox v. Sansom* (f) a right of way for carriages over land coloured green on a plan was held, partly on construction and partly on evidence of user, to extend over the whole land. In *Randall v. Hall* (g) property was sold by auction in sixty lots, the particulars and conditions referring to a plan, upon which a number of roads were marked out so as to provide frontages for all the lots. A purchaser of two lots claimed rights of way over all the roads shown on the plan, but was entitled only to a right of way over the road adjoining his lots and leading directly to the public highway. In *Reilly v. Booth* (h), where a house had been granted, together

(z) *Hutton v. Hambro*, 1860, 2 F. & F. 219; 121 R. R. 787; *Petty v. Parsons*, 1914, 2 Ch. 653. See as to a highway, *R. v. U. K. Electric Co.*, 1862, 2 B. & S. 64; 31 L. J. (N. S.) M. C. 166.

(a) *Sketchley v. Berger*, 1894, 69 L. T. R. 754; *Petty v. Parsons*, sup.

(b) *Clifford v. Hoare*, 1873, L. R. 9

C. P. 362; 43 L. J. (N. S.) C. P. 225.

(c) *Hutton v. Hambro*, sup.

(d) 1906, 22 T. L. R. 667.

(e) 1864, 16 C. B. N. S. 222; 139 R. R. 472.

(f) 1877, 25 W. R. 862.

(g) 1851, 4 D. G. & Sm. 343.

(h) 1890, 44 Ch. D. 12. Dist.

with the "exclusive use" of a gateway connecting the house with the public street, the gateway being described by height, length, and width, the grantee was not confined to using the gateway as a means of access to the premises in the rear, but could use it for all lawful purposes, including match-boarding the ceiling, and fixing a bookstall in the passage.

Construction of particular grants.

In *Senhouse v. Christian*, where a right of way was granted from A to B in, through and along a particular route, no right was conferred to make a transverse way which would have imposed an additional burden on the servient tenement (*i*).

Where A. is entitled under a deed to a right of way over a private road and is also entitled to land abutting on that road, questions have been raised as to the extent and nature of A.'s right of access to the road. Thus, it has been held that a way over a private road to land abutting on the road was not limited to gates which existed at the time of the grant (*k*). It has also been held that the grant in favour of A. of a right of way to A.'s land entitles A. to enter his land at any point (*l*). And it seems that under such a grant A. is entitled to pass from his land to the road at whatever point of his frontage is most convenient to himself (*m*). A. cannot, however, on the ground of this right, claim to prevent the owner of the soil of the road from enclosing it with a fence, so long as reasonable access is left for A. (*n*).

Right of access to road possessed by owner of land abutting on private road.

Similar questions have been raised in the case of a person who has land abutting on a highway. His right to pass from any point on his own land to the highway is incontrovertible (*o*). It is a private right (*p*) quite different from such a person's individual interest in the public right of using the highway (*q*). This right, however, must be reasonably exercised so as not to interfere with the reasonable exercise by the public of their rights of way (*r*).

Possessed by owner of land abutting on highway.

Fourthly, as regards the definiteness or certainty of the way.

A right of way should, generally speaking, have a terminus a quo

Definiteness or certainty of way.

Termini.

London Taverns Co. v. Worley, 1888, 44 Ch. D. 24, where "the exclusive right of gateway" was granted.

(*i*) 1787, 1 T. R. 560; 1 R. R. 300.

(*k*) *South Metropolitan Co. v. Eden*, 1855, 16 C. B. 42; 100 R. R. 608.

(*l*) *Cooke v. Ingram*, 1893, 68 L. T. R. 671; *Sketchley v. Berger*, 1893, 69 L. T. R. 754.

(*m*) *Sketchley v. Berger*, sup.

(*n*) *Petty v. Parsons*, 1914, 2 Ch. 653.

(*o*) *Burgess v. Northwich*, 1880, 6 Q. B. D. 275; 50 L. J. Q. B. 219;

Marshall v. Ulleswater, 1872, L. R. 7 Q. B. 172; 41 L. J. Q. B. 41; *Ramuz v. Southend Board*, 1892, 67 L. T. 169; see *Roberts v. Karr*, 1809, 1 Taunt. 501; 10 R. R. 592.

(*p*) *Chaplin v. Westminster*, 1901, 2 Ch. 329; 70 L. J. Ch. 679.

(*q*) *Ibid.*; *Lyon v. Fishmongers' Co.*, 1875, 1 App. Cas. 676; 46 L. J. Ch. 68; *Fritz v. Hobson*, 1880, 14 Ch. D. 114; 49 L. J. Ch. 735.

(*r*) *Tottenham v. Rowley*, 1912, 2 Ch. 644; *A.-G. v. Brighton Association*, 1900, 1 Ch. 276; 69 L. J. Ch. 204.

Construction
of particular
grants.

and a terminus ad quem, so as to be bounded and circumscribed to a place certain (s). But in *Wimbledon Conservators v. Dixon* (t), the Lords Justices were of opinion that the fact that the occupiers of a tenement to which a way by user was claimed had used, not a definite road marked out between the termini, but a number of tracks indifferently, did not prevent the right from being acquired. Again, on the taking of a lease of land in Ireland the Court implied a grant by the lessor to the lessee of a right of way across the lessor's other land by such route as the lessor should from time to time point out (u). In *Metropolitan R. Co. v. G. W. R.* (x) a lessor had in 1878 leased to the plaintiffs land, together with a right of way through a circular road over the defendants' land. The way was not definitely described, and was never in fact used by the plaintiffs. The Court, in an action brought to enforce the right, expressed an opinion that the right claimed was too undefined and unlimited to allow of an action being maintained.

A grantor of a right of way who has once defined it cannot alter it (y). But in some cases there may be a substitution of a new way for an old one (z).

Coven v.
Truefitt, Ltd.

In *Coven v. Truefitt* (a) a lease of rooms on the second floor of two adjoining houses, numbered 13 and 14, was granted, together with free ingress and egress for the lessee "through the staircase and passages of No. 13"; there was no staircase in No. 13 leading to the premises demised, but there was such a staircase in No. 14. It was held that the lessee was entitled to the use of the staircase in No. 14; in the Court of first instance on the ground that the words "of No. 13" might be rejected as falsa demonstratio; and by the Court of Appeal on the ground of common mistake and the intention of the parties.

With respect to certainty between the termini, questions have arisen where a right of way is granted generally, or arises by implica-

(s) *Albon v. Dremsall*, 1610, 1 Brownl. 216; Yelv. 163; Com. Dig. Chimin, D. 2; and Wilson, J., in *Rouse v. Bardin*, 1790, 1 H. Bl. 355; 37 R. R. 414. In an American case (*Jones v. Percival*, 5 Pick (Mass.) 485) it was held that a right of way over land in all directions where most convenient to the dominant owner and least prejudicial to the servient owner could not be prescribed for, nor could a grant of such a right be presumed. Cf. *A.-G. v. Antrobus*, 1905, 2 Ch. 188 (the case of a public way).

(t) 1875, 1 Ch. D. 362; 45 L. J. Ch. 353.

(u) *Donnelly v. Adams*, 1905, 1 I. R. 154.

(x) 1901, 84 L. T. 333.

(y) *Deacon v. S. E. R.*, 1889, 61 L. T. 377.

(z) See *Hulbert v. Dale*, 1909, 2 Ch. 570; 78 L. J. Ch. 457; *Lovell v. Smith*, 1857, 3 C. B. N. S. 120; and *Young v. Kinloch*, 1910, A. C. 169 (a Scotch case).

(a) 1898, 2 Ch. 551; on appeal, 1899, 2 Ch. 309; 68 L. J. Ch. 563.

tion of law, as to the part of the land over which the way shall be taken—which party is entitled to assign the way—and under what restrictions such right must be exercised. These questions have chiefly arisen in relation to ways of necessity, and the decisions are discussed ante, p. 178. It seems that a way may be defined by usage (*b*). If, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other. “If A. has a way through the land of B., and B. ploughs up the soil where the way was used, and leaves another part of the same close for a way, A. may use the ancient track, and need not go where the way is assigned de novo” (*c*). On the other hand, in the case of the right of way possessed by a rector for carrying his tithe, the servient owner may, for the convenient management of his tenement, vary the way (*d*).

Construction of particular grants.

By the civil law a distinction appears to have existed between those cases in which the servitude, in general terms, was imposed by will, and where it was created by any act inter vivos. In the former case, the option of allotting the position and direction of the servitude was with the heir, provided he did nothing to injure the rights of the party to whom the servitude was devised (*e*); in the latter case, unless the instrument contained some express stipulations in this respect, the grantee was at liberty to select such portion of the servient heritage as was most suitable to him, although, in this case also, certain restrictions were imposed, as that he should not use his servitude to the damage of the grantor's house, gardens, or vineyards (*f*).

Civil law.

(*b*) *Deacon v. S. E. R.*, 1889, 61 L. T. 377; and an American case, *Wynkoop v. Burger*, 12 Johns. N. Y. 222.

(*c*) Com. Dig. Chimin, D. (5); Noy, 128; *Deacon v. S. E. R.*, ubi sup. Dist. *Cooke v. Ingram*, 1893, 68 L. T. 671, where the dominant owner, having a right of way from every part of his tenement, was held not to have limited the right by the use of one mode of access only.

(*d*) *James v. Dods*, 1834, 2 Cr. & M. 266; 3 L. J. (N. S.) Ex. 47.

(*e*) Si via, iter, actus, aquæductus legetur simpliciter per fundum, facultas est hæredi, per quam partem fundi velit constituere servitutem; si modo nulla captio legatario in servitute sit.—Dig. 8, 3, 26, de serv. præd. rust.

(*f*) Si locus, non adjectâ latitudine, nominatus est, per eum qualibet iri poterit. Sin autem prætermisus est, (locus) æque, latitudine non adjectâ, per totum fundum, una poterit eligi via,

duntaxat ejus latitudinis, quæ lege comprehensa est; pro quo ipso, si dubitabitur, arbitri officium invocandum est.—Ib. 13, § 3.

Si cui simpliciter via per fundum cuiuspiam cedatur, vel relinquatur, in infinito (videlicet per quamlibet ejus partem) ire agere licebit; civiliter modo. Nam quædam in sermone tacite excipiuntur; non enim per villam ipsam, nec per medias vineas ire agere sinendus est: cum id æque commodè per alteram partem facere possit, minore servientis fundi detrimento.—Dig. 8, 1, 9, de serv.

Sed quæ loca ejus fundi tunc, cum ea fieret cessio, ædificiis, arboribus, vineis vacua fuerint, ea sola eo nomine servient.—Dig. 8, 3, 22, de serv. præd. rust.

Si mihi concesseris iter aquæ per fundum tuum, non destinatâ parte, per quam ducerem—totus fundus tuus serviet.—Ib. 21.

Construction
of particular
grants.

If, however, the party so entitled once made his choice, he was no longer at liberty to select a new direction for the exercise of his servitude (*g*).

(*g*) Verum constitit, ut, qua primum viam direxisset, eâ demum ire agere deberet, nec amplius mutandæ ejus potestatem haberet; sicuti Sabino quoque videbatur; qui argumento rivi utebatur—quem primo qualibet ducere licuisset, posteaquam ductus esset, transferre non liceret; quod et in viâ servandum esse verum est.—Dig. 8,

1, 9, de serv.

At si iter actusve sine ullâ determinatione legatus est; modo determinabitur: et, qua primum iter determinatum est, eâ servitus constitit: cæteræ partes agri liberæ sunt. Igitur arbiter dandus est, qui utroque casu viam determinare debet.—Dig. 8, 3, 13, § 1, de serv. præd. rust.

CHAPTER VI.

RIGHT TO SUPPORT FROM NEIGHBOURING SOIL AND HOUSES.

THE right to support from the adjacent or subjacent soil may be claimed (1) in respect of land in its natural state, or (2) in respect of land subjected to an artificial pressure by means of buildings or otherwise. (3) A further right to support may be claimed for one building from adjacent or subjacent buildings.

In connection with this subject, a question of considerable importance arises with regard to the degree of care which a party is bound to use in withdrawing support to which no right has been acquired by an easement.

SECT. I.—*Natural Support to Land.*

If every proprietor of land were at liberty to dig and mine *at pleasure on his own soil*, without considering what effect such excavations must produce upon the land of his neighbours, it is obvious that the withdrawal of the lateral support would, in many cases, cause the falling in of the land adjoining. As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence; and in all those cases at least in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to the support of it, not as an easement but as an ordinary right of property, necessarily and naturally attached to the soil. The leaning of the Courts appears to have been in favour of this doctrine from a very early period: thus, in Rolle's Abridgment (a) it is laid down, "It seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie." "It may be true," said Lord Tenterden, in *Wyatt v. Harrison* (b), "that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in

Lateral support.

(a) Vol. 2, 564, Trespass, Justification, I. pl. 1; *Wilde v. Minsterley*. And see *West Leigh Co. v. Tunnichiffe*, 1908,

A. C. 30.

(b) 1832, 3 B. & Ad. 876; 1 L. J. (N. S.) K. B. 237; 37 R. R. 566.]

his land, so as to occasion mine to fall in, he may be liable to an action."

Primâ facie
rule as to
support
whether
vertical or
lateral.

Questions as to support have arisen where the title to land A has been severed from the title to land B which is subjacent to land A vertically ; or from the title to land C which is adjacent to land A laterally. The primâ facie rule in these cases is that (independently of the result of any facts or instruments connected with the severance) the owner of land A is of common right entitled to have it supported vertically by land B (c) and laterally by land C (d). But the obligation to support land A laterally only binds that portion of the adjacent land C, the existence of which in its natural state is necessary for the support of land A (e).

Support
from water.

The natural right does not extend to have the support of any underground water which may be in the soil, so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so ; the presence of the water in the soil being an accidental circumstance, the continuance of which the landowner has no right to count upon (f).

In *Popplewell v. Hodkinson*, sup., land was granted for building subject to a chief rent, and cottages were built upon it, and the owner afterwards granted the adjacent land to the builders of a church, whose excavations so far drained the land on which the cottages stood that the soil subsided and they became cracked and damaged. The church builders, however, were held not responsible. The Court said, "Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil if for any reason it becomes necessary or convenient for him to do so. It may indeed be, that when one grants land to another for some special purposes,—for building purposes, for example,—then since, according to the old maxim, a man cannot derogate from his own grant, the grantor cannot do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been." They held

(c) *Humphries v. Brogden*, 1848, 12 Q. B. 739 ; 20 L. J. Q. B. 10 ; 76 R. R. 402 ; *Harris v. Ryding*, 1839, 5 M. & W. 60 ; 8 L. J. (N. S.) Ex. 181 ; 52 R. R. 632 ; *Caledonian R. Co. v. Sprott*, 1856, 2 Macqueen. 449 ; *Bonomi v. Backhouse*, 1859, 9 H. L. C. 503 ; 28 L. J. (N. S.) Q. B. 278 ; *N. E. R. v. Elliott*, 1863, 10 H. L. C. 333 ; 32 L. J. Ch. 402 ; 138 R. R. 179.

(d) *Hunt v. Peake*, 1860, John. 705 ;

29 L. J. Ch. 785 ; 123 R. R. 301 ; *Dalton v. Angus*, 1881, 6 App. Cas. 808, 809 ; 50 L. J. Q. B. 689.

(e) *Birmingham v. Allen*, 1877, 6 Ch. D. 284.

(f) *Popplewell v. Hodkinson*, 1869, L. R. 4 Ex. 248 ; 38 L. J. Ex. 126 ; *Gill v. Westlake*, 1885, 10 App. Cas. 200 ; but see *Littledale v. Lonsdale*, 1791, 1899, 2 Ch. 233 ; *Jordeson v. Sutton Co.*, 1899, 2 Ch. 217 ; 68 L. J. Ch. 457.

that there was nothing in the grant to the plaintiff to warrant the inference of an implied condition to prevent the defendant from doing with the adjacent land what was incidental to its ordinary use, viz., draining it in order to render it more capable of being adapted to building purposes (*g*). There may, however, be a right of support from silt or liquid pitch. Thus, in *Jordeson v. Sutton Co.* (*h*), the defendants carried out excavation works upon their property, which adjoined the plaintiff's property, and in the course of such excavation cut through a stratum of running silt, with the result that the plaintiff's houses erected upon his adjoining property subsided. The evidence was conflicting as to whether the stratum of silt could truly be considered to be muddy water or wet sand, and in effect the decision turned upon the view taken by a majority of the Court of Appeal as to the conclusion to be drawn from this evidence; two of the learned Lords Justices (*i*) holding that the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand, whilst the third (*k*) came to the conclusion that the withdrawal of subterranean water support had caused the subsidence. The decision of a majority of the Court was therefore based upon the ordinary law with regard to the right to support. In *Trinidad Co. v. Ambard* (*l*) the subsidence of the plaintiffs' land was caused by the oozing and escape of pitch, which formed the main ingredient of the plaintiffs' land, consequent upon excavations on the defendant's adjacent lands. The judgment of the Privy Council was in favour of the plaintiffs, but the grounds of the decision were based upon the conclusion that the pitch or asphalt which escaped from beneath the plaintiffs' land was not in the nature of water. "Asphaltum," said Lord Macnaghten, "is a mineral, not water."

From silt.

From liquid pitch.

These rights of support possessed by the owner of land A are not rights to have the whole or any part of the adjacent or subjacent soil left in its natural state, but simply rights not to have land A injured by anything done, however carefully, in the adjoining soil subjacent or adjacent (*m*). Hence, if on the working of the subjacent soil a subsidence can be prevented by the use of artificial

Nature of the right.

Statutes of Limitation.

(*g*) *Popplewell v. Hodgkinson*, 1869, L. R. 4 Ex. 248; 38 L. J. Ex. 126; cf. *Elliot v. N. E. R.*, 1863, 10 H. L. C. 333; 30 L. J. (N. S.) Ch. 160.

(*h*) 1899, 2 Ch. 217; 67 L. J. Ch. 666; affirming the decision of North. J., 1898, 2 Ch. 614; 68 L. J. Ch. 457. See *Fletcher v. Birkenhead*, 1906, 1 K. B. 603; 1907, 1 K. B. 205; 76 L. J. K. B. 218.

(*i*) Lindley, M.R., and Rigby, L.J.

(*k*) *Vaughan Williams*, L.J.

(*l*) 1899, A. C. 594; 68 L. J. P. C. 114. See *Brine Pumping Act*, 1891, and *Salt Union v. Brunner*, 1906, 2 K. B. 822; 76 L. J. K. B. 55.

(*m*) *Dalton v. Angus*, 1881, 6 App. Cas. 808; 50 L. J. Q. B. 689; *Bonomi v. Backhouse*, 1859, E. B. & E. 657; 28 L. J. Q. B. 381; 28 L. J. (N. S.) Q. B. 278.

means of support, no cause of action arises (*n*). And as no cause of action arises until actual injury is caused to land A, time does not begin to run under the Statutes of Limitation until then (*o*). Where there are successive subsidences arising from one digging, time runs from each subsidence as a separate cause of action (*p*).

Buildings.

Even if the pressure upon the adjoining soil has been increased by modern buildings on the surface, still an action will lie if the soil would have sunk if there had been no buildings thereon (*q*).

Vertical support of surface by subjacent minerals.
Copyhold land.

The rules as to the support of the surface by subjacent minerals require to be stated more fully, and to be distinguished in the several cases of copyhold and freehold land (*r*).

In the case of copyholds the copyholder, according to the general rule, has possession not only of the surface of his copyhold land but of everything below the surface, including minerals. On the other hand, the property in these minerals is in the land (*s*). The result is that, in the absence of special custom, neither the lord nor the copyholder can work the minerals, but the concurrence of both is necessary (*t*). The general rule, however, may be varied by special custom. Thus, there may be a special custom entitling the lord to get the subjacent minerals provided he does not let down the surface (*u*). Again, there may be a special custom entitling the lord paying compensation to let down the surface (*x*). And possibly there might be a good custom entitling the lord without paying compensation to let down the surface where the custom is confined

(*n*) *Bower v. Peate*, 1876, 1 Q. B. D. 327; 45 L. J. Q. B. 446; *Rowbotham v. Wilson*, 1857, 8 E. & B. 157; 30 L. J. Q. B. 49; 125 R. R. 192.

(*o*) See judgment in *Bonomi v. Backhouse*, 1859, E. B. & E. 655; 9 H. L. C. 503; 28 L. J. (N. S.) Q. B. 278; establishing the similarity, in this respect, of the acquired easement in respect of an ancient house to the natural right in respect of the soil unencumbered. *West Leigh Co. v. Tunnicliffe*, 1908, A. C. 27; 77 L. J. Ch. 102.

(*p*) *Darley Main Co. v. Mitchell*, 1886, 11 App. Cas. 127; 55 L. J. Q. B. 529; *Crumble v. Wallsend Local Board*, 1891, 1 Q. B. 503; 60 L. J. Q. B. 392; and per Lord Blackburn in *Dalton v. Angus*, 1881, 6 App. Cas. at p. 803; 50 L. J. Q. B. 689. Dist. *Spoor v. Green*, 1874, L. R. 9 Exch. 99; 43 L. J. (N. S.) Ex. 57, an action on the covenants for title; and *Great Laxey Co. v. Clague*, 1878, 4 App. Cas. 115, where compensation was awarded once for all. It does not follow that the person in possession of the land when the subsidence occurs

is liable for the damage (*Greenwell v. Low Beechburn Co.*, 1897, 2 Q. B. 165; 66 L. J. Q. B. 643; *Hall v. Norfolk*, 1900, 2 Ch. 493; 69 L. J. Ch. 571). Cf. as to liability under a covenant in a lease, *Forster v. Elvel*, 1908, 1 K. B. 629. An obstruction to ancient lights is a continuing wrong (*Jenks v. Clifden*, 1897, 1 Ch. 694; 66 L. J. Ch. 38).

(*q*) *Stroyan v. Knowles and Hamer v. Knowles*, 1861, 6 H. & N. 454; 30 L. J. (N. S.) Ex. 102; 123 R. R. 622; *Hunt v. Peake*, 1860, John. 705; 29 L. J. Ch. 785; 123 R. R. 301. As to the measure of damages in such a case, see below, p. 370.

(*r*) See *Eardley v. Granville*, 1876, 3 Ch. D. 834; 45 L. J. Ch. 669.

(*s*) *Re Clavering*, 1915, W. N. 195.

(*t*) *Inland Revenue v. Joicey*, 1913, 2 K. B. 586; 82 L. J. K. B. 748; *A.-G. v. Tomlin*, 1877, 5 Ch. D. 762, 768; 46 L. J. Ch. 654.

(*u*) *Ibid*.

(*x*) *Aspden v. Seddon*, 1876, 1 Ex. D. 510; 46 L. J. Ex. 353.

to the waste (*y*). But a custom entitling the lord without paying compensation to let down the surface of any parcel of the manor was held bad (*z*). The copyholder can of course release his power of veto on the working of minerals (*a*).

Vertical support of surface by subjacent minerals.

In the case of freeholds where the titles to the surface and to the subjacent minerals have been severed, special attention must be paid to the instrument of severance, which may be a lease or a deed of grant or reservation or an Inclosure Act or award (*b*). And where the instrument contains no provision bearing on support, the *primâ facie* rule is that the right of support is attached as of common right to the surface, not only where the surface is retained and the subjacent minerals are granted (*c*), but also where the surface is granted and the subjacent minerals are retained (*d*).

Freehold land.

Primâ facie rule as to vertical support from minerals.

The *primâ facie* rule may, however, be altered by the owner of the subsoil acquiring by prescription a right or easement (analogous to a right of way) to cause subsidence of the surface (*e*).

Exceptions to *primâ facie* rule.

In *Hilton v. Granville* (*f*) it was said that, "even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." But this dictum was overruled in *Rowbotham v. Wilson* (*g*) and *Buchanan v. Andrew* (*h*), and must be regarded as no longer law (*i*). In *Hilton v. Granville* it was also decided that a right in the mine-owner to let down the surface without making compensation could not be claimed by prescription, being oppressive and destructive of the subject-matter of the grant of the surface. This decision was based on the opinion above

(1) Prescriptive easement to let down surface.

Hilton v. Granville.

(*y*) *Gill v. Dickinson*, 1880, 5 Q. B. D. 159; 49 L. J. Q. B. 262.

(*z*) *Hilton v. Granville*, 1845, 5 Q. B. 701; 13 L. J. Q. B. 193; 64 R. R. 604. See *Bell v. Love*, 1883, 10 Q. B. D. 561; 52 L. J. Q. B. 290.

(*a*) *Inland Revenue v. Joicey*, *sup.*

(*b*) *Butterknowle Co. v. Bishop Auckland Co.*, 1906, A. C. 313; 75 L. J. Ch. 541.

(*c*) *Davis v. Trecharne*, 1881, 6 App. Cas. 466; 50 L. J. Q. B. 665.

(*d*) *Proud v. Bates*, 1865, 34 L. J. Ch. 412; 146 R. R. 672. See *Dixon v. White*, 1883, 8 App. Cas. 842.

(*e*) *Rowbotham v. Wilson*, 1860, 8 H. L. C. 362; 30 L. J. Q. B. 49; 125 R. R. 192; *Sitwell v. Londesborough*, 1905, 1 Ch. 465; 74 L. J. Ch. 254. See *Richards v. Harper*, 1866, L. R. 1 Ex. 203; 31 L. J. Ex. 130.

(*f*) 1845, 5 Q. B. 701, at p. 730; 13 L. J. Q. B. 193; 64 R. R. 604.

(*g*) 1860, 8 H. L. C. 348; 30 L. J. Q. B. 49; 125 R. R. 192.

(*h*) 1873, L. R. 2 H. L. Sc. 286.

(*i*) Per Lord Denman in *Blackett v. Bradley*, 1862, 1 B. & S. 940, 954; 31 L. J. Q. B. 65; 124 R. R. 815; per Lord Hatherley in *Buccleuch v. Wakefield*, 1869, L. R. 4 H. L. 377, 399; 39 L. J. Ch. 441; per Lord Blackburn in *Dixon v. White*, 1883, 8 App. Cas. 833, 843; and per Baggallay, L.J., in *Bell v. Love*, 1883, 10 Q. B. D. 547, at p. 561; *aff.* 9 App. Cas. 286; 52 L. J. Q. B. 290. Cf. per Watson, B., in *Carlyon v. Lovering*, 1857, 1 H. & N. at p. 798; 26 L. J. Ex. 251; 108 R. R. 822; and *Great Laxey Mining Co. v. Clague*, 1878, 4 App. Cas. 115. A grant by a copyholder of such a right would be waste, and different considerations therefore apply. See *Richards v. Harper*, 1866, L. R. 1 Ex. 199; 35 L. J. Ex. 130.

Vertical support of surface by subjacent minerals.

Hilton v. Granville.

quoted, that such a right could not be created by an express grant, and, unless it can be supported on some other ground, would seem to fall with it; for any claim which may be lawfully made by grant may be supported by proof of user (*k*). Accordingly, *Hilton v. Granville* has often been treated as overruled or shaken on this point also (*l*). But in *Blackett v. Bradley* (*m*) Blackburn, J., in the course of the argument, suggested that "it may be that, though the parties may legally have made such a compact, it would not be reasonable to presume that they had done so"; and this distinction was, in *Bell v. Love* (*n*), adopted and approved by Baggallay, L.J., who thought *Hilton v. Granville* well decided. Perhaps, if the point should arise, the rule of law laid down in *Hilton v. Granville* (which was decided on demurrer) could scarcely be upheld; but the dictum of Blackburn, J., would be of importance in considering the effect of the evidence. The decision in *Hilton v. Granville*, so far as it decides that a copyhold custom to let down the surface without making compensation is void for unreasonableness, has not been shaken (*o*). But, in order to support a right by grant to let down the surface, there must be clear words indicating an intention to confer such a right, in derogation of the ordinary and *prima facie* right to support, as against the subjacent owner (*p*).

(2) Result of instrument of severance.

Again, the *prima facie* rule may be expressly or impliedly altered by the instrument effecting the severance (*q*). As to this the decisions are very numerous. But in *Butterknowle Co. v. Bishop Auckland Co.*, which was before the House of Lords in 1906 (1906, A. C. 313) Lord Macnaghten dealt with these questions in words which he hoped would relieve counsel from the necessity or custom of going through all the cases on the subject (*r*). His words are accordingly given at length as follows:—"It must," he said, "be

Lord Macnaghten's ruling in *Butterknowle Co. v. Bishop Auckland Co.*

(*k*) *Carlyon v. Lovering*, 1857, 1 H. & N. 784, 797; 26 L. J. Ex. 251; 108 R. R. 822; cf. *Rogers v. Taylor*, 1 H. & N. 706.

(*l*) E.g., by Lord Chelmsford in *Buckleuch v. Wakefield*, 1870, L. R. 4 H. L. at p. 410; 39 L. J. Ch. 441.

(*m*) 1862, 1 B. & S. at p. 953; 31 L. J. Q. B. 65; 124 R. R. 815.

(*n*) 1883, 10 Q. B. D. at p. 561; 52 L. J. Q. B. 290; aff. in H. L., sub nom. *Love v. Bell*, 9 App. Cas. 286; 52 L. J. Q. B. 290.

(*o*) Cf. *Carlyon v. Lovering*, 1857, 1 H. & N. 799; 26 L. J. Ex. 251; 108 R. R. 822; *Salisbury v. Gladstone*, 1861, 9 H. L. C. 692; 131 R. R. 403; *Broadbent v. Wilkes*, 1742, Willes, 360; 1 Wils.

63; 2 Str. 1224.

(*p*) See *Smart v. Morton*, 1855, 5 E. & B. 30; 24 L. J. Q. B. 260; 103 R. R. 346; *Roberts v. Haines*, 1856, 6 E. & B. 643; 7 E. & B. 625; 25 L. J. Q. B. 353; 106 R. R. 745; *Dugdale v. Robertson*, 1857, 3 K. & J. 695; 112 R. R. 349; *Proud v. Bates*, 1865, 11 Jur. N. S. 441; 34 L. J. Ch. 406; 146 R. R. 672.

(*q*) *Davis v. Trehearne*, 1881, 6 App. Cas. 467; 50 L. J. Q. B. 665; *Dixon v. White*, 1883, 8 App. Cas. 843; *Butterknowle Co. v. Bishop Auckland Co.*, 1906, A. C. 313; 75 L. J. Ch. 541.

(*r*) See *Butterley Co. v. New Hucknall*, 1910, A. C. 385; 78 L. J. Ch. 63.

taken that the law has been ascertained and settled beyond question by the more recent decisions in this House, of which it is only necessary to mention *Davis v. Trelhorne* (1881, 6 App. Cas. 167), *Dixon v. White* (1883, 8 App. Cas. 813), *Love v. Bell* (1884, 9 App. Cas. 288; 52 L. J. Q. B. 290), and *New Sharlston Co. v. Westmorland* (1904, 2 Ch. 443, n.).

Vertical support of surface by subjacent minerals.

“The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication.

“This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an Inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an Inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorized to work the minerals and enjoy the property as fully and freely as if the Inclosure Act had not been passed. The difficulty of applying such an hypothesis to the altered condition of things brought about by an Inclosure Act has, as it seems to me, led this House to treat the provision in which it is found, and of which it would seem at first sight to be the keynote, as a dead letter for any practical purpose.

“Although provision for compensation is not of itself sufficient to show that the mine-owner working in the usual and proper manner is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched (*s*). On the other

(*s*) According to Lord Davey, if there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law

rule as to the surface owner being entitled to support was intended to apply (1906, A. C. 315).

Vertical support of surface by subjacent minerals.

hand, the presence of a provision for compensation, which is obviously inadequate or plainly inappropriate if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated.

"The only case in this House not altogether in harmony with recent decisions is *Buccleuch v. Wakefield* (t). Whether all the refined and somewhat subtle distinctions which the noble and learned Lords who decided *Love v. Bell* (u) were able to discover between the Duke of Buccleuch's case and the case before them are, or are not, wholly satisfactory, the way in which the Duke of Buccleuch's case was treated shows that it must be regarded as standing by itself, and outside the line of authorities embodying and illustrating the law.

"Such being, in my opinion, the state of the law at the present day, I do not propose to trouble your Lordships by any reference to cases in the Courts below preceding *Davis v. Treharne* (x). They are certainly not all consistent with the law as now established. They have all been considered in this House. Each has had its due weight in contributing to the result. And it seems to me that a minute and over-careful study of cases where the language of the instrument to be construed is not quite the same, or where, if the language is the same, the decision is not binding on this House, is more likely to prove an embarrassment than any help to a right conclusion. I may, however, observe in passing that in my opinion the case of *Conssett Waterworks Co. v. Ritson* (y), which was cited in the Courts below and in this House from the shorthand notes, can no longer be regarded as an authority."

Having regard to Lord Macnaghten's words, the decisions on similar questions before *Butterknowle Co. v. Bishop Auckland Co.* are here only indicated or referred to very shortly as follows.

Earlier cases where surface owner's right to support was negatived.

First there are the following cases in which the inference from the instrument of severance was held sufficiently clear to negative the right of support:—*Rowbotham v. Wilson* (z); *Buccleuch v. Wakefield* (a); *Williams v. Bagnall* (b); *Aspden v. Seddon* (c); *Gill v. Dickinson* (d); *Buchanan v. Andrew* (e); *Bell v. Dudley* (f). To the

(t) 1869, L. R. 4 H. L. 377; 39 L. J. Ch. 441.

(u) 1884, 9 App. Cas. 286; 52 L. J. Q. B. 290.

(x) 1881, 6 App. Cas. 460; 50 L. J. Q. B. 665.

(y) 1889, 22 Q. B. D. 318, 702.

(z) 1860, 8 H. L. C. 348; 30 L. J. Q. B. 49; 125 R. R. 192.

(a) 1869, L. R. 4 H. L. 377; 39 L. J.

Ch. 441.

(b) 1867, 15 W. R. 272.

(c) 1875, 10 Ch. 394; 46 L. J. Ch. 353.

(d) 1880, 5 Q. B. D. 159; 49 L. J. Q. B. 262.

(e) 1873, L. R. 2 Sc. App. 286.

(f) 1895, 1 Ch. 182; 64 L. J. Ch. 291. Cf. *Thompson v. Mein*, 1893, W. N. 202.

above must be added certain cases on mining leases, in which the forms of the leases have been held to release the lessee from the common law obligation to support the superjacent land (*g*).

In the following cases the inference from the instrument of severance was in favour of the common law right of support being retained:—*Harris v. Ryding* (*h*), where the grantor reserved the mines and minerals, with power to come upon the surface, to get and carry away the minerals, and to sink shafts, “making a fair compensation to T.P. (the grantee of the surface) for the damage to be done to the surface of the said premises or the pasture and crops growing thereon”; *Smart v. Morton* (*i*), where the reservation was somewhat similar, but the grantor covenanted to pay treble damages for any damage caused; *Roberts v. Haines* (*k*), where the power to work mines was contained in an Inclosure Act, which also made special provisions (which had not been infringed) for the support of surface buildings by fixing certain limits within which no working should take place at all; *Allaway v. Wagstaff* (*l*), where the subsidence was held not to be “surface damage” within the meaning of the Act for regulating mining in the Forest of Dean; *Proud v. Bates* (*m*), where the reservation was contained in a lease; *Bell v. Wilson* (*n*), where the minerals reserved included freestone, which was admitted not to be commonly got by underground working; *Hext v. Gill* (*o*), where the reservation extended to china clay, which could not be got without destroying the surface; *Benfieldside Board v. Consett Iron Co.* (*p*), where words in themselves wide were held to be qualified by an express grant to the public of a right inconsistent with the destruction of the surface; *Davis v. Treharne* (*q*), where the grant relied upon was contained in a mining lease, which authorized the lessee to work the mines “in the usual and most approved way in which the same was performed in other works of the like kind in the county,” and provided for compensation for “damage or injury to the surface”; *Mundy v. Rutland* (*r*), where the reservation, being

Vortical support of surface by subjacent minerals.

Earlier cases where surface owner's right to support was affirmed.

(*g*) *Taylor v. Shafto*, 1867, 8 B. & S. 228; *Shafto v. Johnson*, 1863, 1b. 252, n.; *Smith v. Darby*, 1872, L. R. 7 Q. B. 716; 42 L. J. (N. S.) Q. B. 140; *Eadon v. Jeffcock*, 1872, L. R. 7 Exch. 379; 42 L. J. (N. S.) Ex. 36.

(*h*) 1839, 5 M. & W. 60; 8 L. J. (N. S.) Ex. 181; 52 R. R. 632.

(*i*) 1855, 5 E. & B. 30; 24 L. J. Q. B. 260; 103 R. R. 346.

(*k*) 1856, 6 E. & B. 643; 25 L. J. Q. B. 12; 106 R. R. 702.

(*l*) 1859, 4 H. & N. 681; 29 L. J. Ex. 51; 118 E. R. 688.

(*m*) 1865, 34 L. J. Ch. 406.

(*n*) 1866, 1 Ch. 303; 35 L. J. Ch. 337; dist. *A.-G. v. Welsh Granite Co.*, 1887, 35 W. R. 617.

(*o*) 1872, 7 Ch. 699; 41 L. J. (N. S.) Ch. 761.

(*p*) 1877, 3 Ex. D. 54; 47 L. J. Ex. 491.

(*q*) 1881, 6 App. Cas. 460; 50 L. J. Q. B. 665. Cf. *Greenwell v. Low Brechburn Co.*, 1897, 2 Q. B. 165; 66 L. J. Q. B. 643.

(*r*) 1882, 23 Ch. D. 81.

Vertical support of surface by subjacent minerals.

vague, was not permitted to operate in the grantor's favour; *Chapman v. Day* (s), where full compensation was provided for "loss or injury . . . by reason of the working of the minerals"; *Dixon v. White* (t), where a lessee of "the whole coal" under certain lands was empowered to work and win it, but not to "break the surface" of the land, and the lease stipulated that he should indemnify the lessor for the "whole damage and injury occasioned by the aforesaid operations"; *Love v. Bell* (u), where an Inclosure Act provided that the lords of the manor should hold and enjoy all mines, &c., "in as full, ample, and beneficial a manner to all intents and purposes" as if the Act had not been passed, and that the mine-owner should make satisfaction (not to exceed £5 per acre per year) for "damages and spoil of ground" occasioned by his working to the person in possession of the surface; *L. & N. W. R. Co. v. Evans* (x), where an Act authorizing the undertakers to maintain the navigation of a brook did not expressly refer to minerals; *G. W. R. Co. v. Cefn Cribbwr Co.* (y), where a conveyance of land for a horse tramway reserved the adjacent mines with power to work them, but not so as to injure the tramway; *New Sharlston Co. v. Westmorland* (z), where the grantee covenanted to make satisfaction to be assessed as therein mentioned for the spoil or damage or injury done; *Glumorganshire Co. v. Nixon's Co.* (a), where a canal company having under statutory authority acquired lands, paying compensation in accordance with their Act, the owners of the subjacent and adjacent land were entitled to work and win coal only in so far as it could be done without injuring the support of the canal; *Clippens v. Edinburgh* (b), a case of support to a water pipe laid under statutory authority, the uninterrupted enjoyment for nearly eighty years being held to raise a presumption that whatever was necessary to obtain the right to support for the pipe had been done; *Butterknowle Co. v. Bishop Auckland Co.* (c), where an Inclosure Act empowered the lords of the manor to work the mines and minerals under the allotments as fully and freely as they might or could have done if the Act had not been passed, "and that without making or paying any satisfaction for so doing," and contained a compensation clause

(s) 1883, 47 L. T. 705.

(t) 1883, 8 App. Cas. 833.

(u) 1884, 9 App. Cas. 288; 53 L. J. Q. B. 257. Cf. *Twyerould v. Chamber Colliery Co.*, 1892, W. N. 27; aff. in H. L., but not reported

(x) 1893, 1 Ch. 16; 62 L. J. Ch. 1.

(y) 1894, 2 Ch. 157; 63 L. J. Ch. 506.

(z) 1900, 82 L. T. 725; 1904, 2

Ch. 443, n.; affirming the decision of North, J., 79 L. T. 716, and the C. A., 80 L. T. 846.

(a) 1901, 85 L. T. 53.

(b) 1904, A. C. 64; 73 L. J. P. C. 32.

(c) 1906, A. C. 305; 75 L. J. Ch. 541; affirming the decisions of Farwell, J., and the C. A., 1904, 2 Ch. 419.

providing that any damage done to an allottee by the exercise of the powers reserved to the lords should be paid for by an assessment upon the occupiers of the other allotments; and *Manchester Corporation v. New Moss* (*d*), where it was held that s. 23 of the Waterworks Clauses Act, 1847, which gives to the owner of minerals under lands adjacent to a reservoir the right to work such mines, after notice duly given under the provisions of the Act, does not take away the common law right of lateral support in respect of land upon which the reservoir is situate.

Vertical support of surface by subjacent minerals.

The principle that an owner cannot derogate from his grant was thought to create a presumption in every case against the grantor and in favour of the grantee (*e*); but the question is now reduced to one of construction (*f*).

The provision of compensation for damage may sometimes affect the judgment of the Court in favour of the right to let down the surface (*g*), and the wording of such a provision may even operate so as to extend the powers reserved (*h*). But it must be remembered that compensation may sometimes be made payable for acts which are forbidden; it may be intended as a collateral remedy, not for the use of the powers intended to be conferred (*i*), but for their abuse (*j*).

The instrument of severance discussed in many of the above cases was an Inclosure Act which was nothing more than a statutory agreement between the parties (*k*). There is, however, a separate class of statutes under which the severance has been frequently effected, such as the Railway and Canal Acts (*l*). These statutes usually contain express provisions as to working minerals near lands

Severance under Railway and Canal Acts.

(*d*) 1906, 2 Ch. 564; 75 L. J. Ch. 145; 1908, A. C. 117.

(*e*) *Proud v. Bates*, ubi sup. Cf. *Mundy v. Rutland*, ubi sup.

(*f*) Per Lord Blackburn in *Dixon v. White*, 1883, 8 App. Cas. p. 843.

(*g*) Per Jessel, M.R., in *Aspden v. Seddon*, 1875, 10 Ch. 396, n.; 46 L. J. Ex. 353; and per Chitty, J., in *Bell v. Dudley*, 1895, 1 Ch. 186; 64 L. J. Ch. 291; and see *Barr v. Baird*, 1904, 6 F. 524.

(*h*) *Aspden v. Seddon*, 1875, 10 Ch. 394; 46 L. J. Ex. 353. Cf. per Lord Watson in *Love v. Bell*, 1884, 9 App. Cas. at p. 299; 53 L. J. Q. B. 257; and *A.-G. v. Welsh Granite Co.*, 1887, 35 W. R. 617.

(*i*) *Aspden v. Seddon*, ubi sup.

(*j*) *Dixon v. White*, ubi sup. See now, as to compensation clauses, the words of Lord Macnaghten in *Butterknowle Co. v. Bishop Auckland Co.*,

ante, p. 349, and the words of Lord Davey in the same case referring to his own earlier judgment in *New Sharlston Co. v. Westmorland*, 1904, 2 Ch. 443, n.

(*k*) See *Bishop Auckland Co. v. Butterknowle Co.*, 1904, 2 Ch. 425; 73 L. J. Ch. 635; *Rowbotham v. Wilson*, 1860, 8 H. L. C. 363; 30 L. J. Q. B. 49; 125 R. R. 192; *Butterley Co. v. New Hucknall Co.*, 1910, A. C. 387; 78 L. J. Ch. 63.

(*l*) *Wyrley Canal Co. v. Bradley*, 1806, 7 East. 368; 8 R. R. 642; *Dudley Canal Co. v. Grazebrook*, 1830, 1 B. & Ad. 59; 8 L. J. K. B. 361; 35 R. R. 212; *Stourbridge Navigation Co. v. Dudley*, 1860, 3 E. & E. 409; 30 L. J. Q. B. 108; 122 R. R. 762; *G. W. R. v. Fletcher*, 1860, 5 H. & N. 689; 29 L. J. Ex. 253; 120 R. R. 786. See also the judgments in *Caledonian R. Co. v. Sprot*, 2 Macqueen, 451; *Same v. Lord Belhaven*, 3 Macqueen, 56.

Vertical support of surface by subjacent minerals.
Railways
Clauses Act,
1845.

purchased for the construction of statutory undertakings; and severance under these statutes stands upon a footing apart from the ordinary law (*m*).

Thus, by the Railways Clauses Act, 1845, it is provided (*n*) that a railway company shall not in the first instance (*o*) be entitled to the mines and minerals (*p*) under the land purchased by them. But before working (*q*) any mines or minerals lying under the railway or the works connected therewith or within the prescribed distance (forty yards unless otherwise provided by the company's special Act) therefrom, the owner or occupier must give to the company notice of his intention so to do. Thereupon the company may give a counter-notice to the effect that they are willing to make compensation (*r*) for the mines; but if no such counter-notice be given within thirty days the owner may work the mines in a proper and usual manner as provided by the Act.

When notice has been duly given (as above) of an intention to

(*m*) See the words of Lord Cranworth quoted in *Midland R. Co. v. Robinson*, 1889, 15 App. Cas. 27; 59 L. J. Ch. 442. As to the support of sewers, &c., carried through land not purchased by the undertakers, see above, p. 112, n.

(*n*) Sects. 77 to 85.

(*o*) I.e., unless they expressly purchase the mines (*Errington v. Metropolitan District R. Co.*, 1881, 19 Ch. D. 559; 51 L. J. Ch. 305).

(*p*) As to what are "mines and minerals," see *Bell v. Wilson*, 1866, 1 Ch. 303; 35 L. J. Ch. 337 (freestone); *Midland R. Co. v. Checkley*, 1867, 4 Eq. 19; 36 L. J. Ch. 380 (stone); *Hext v. Gill*, 1872, 6 Ch. 699; 41 L. J. (N. S.) Ch. 761 (china clay); *Midland R. Co. v. Haunchwood Co.*, 1882, 20 Ch. D. 552; 51 L. J. Ch. 776 (clay); *A.-G. v. Welsh Granite Co.*, 1887, 35 W. R. 617 (granite); *Glasgow v. Farie* (1888), 13 App. Cas. 657; 58 L. J. P. C. 33 (clay); *Jersey v. Neath*, 1889, 22 Q. B. D. 555; 58 L. J. Q. B. 573 (brick earth and clay); *Midland R. Co. v. Robinson*, 1889, 15 App. Cas. 19; 59 L. J. Ch. 442 (limestone); *Ruabon Co. v. G. W. R.*, 1893, 1 Ch. 427; 62 L. J. Ch. 483 (clay); *G. W. R. Co. v. Blades*, 1901, 2 Ch. 624; 70 L. J. Ch. 847; *In re Todd, Birston & Co. and the N. E. R. Co.*, 1903, 1 K. B. 603; 72 L. J. K. B. 337; *North British R. v. Turners*, 1905, 6 F. 900 (clay held not a mineral). As to substances other than "mines and minerals," it seems that

the company would have the ordinary rights of a private owner.

(*q*) There must be a bona fide intention on the part of the owner to work the minerals by himself, his lessees or licensees (*Midland R. Co. v. Robinson*, ubi sup.).

(*r*) The compensation is ascertained under the Lands Clauses Act (*R. v. L. & N. W. R.*, 1894, 2 Q. B. 512; 63 L. J. Q. B. 695). As to the right of a life tenant in respect of the compensation money, see *In re Barrington*, 1886, 33 Ch. D. 523; 56 L. J. Ch. 175; *In re Robinson*, 1891, 3 Ch. 129; 60 L. J. Ch. 776. As to taking into consideration a subsequent rise in the price of coal, see *Bwlfa Collieries v. Pontypridd Waterworks*, 1903, A. C. 426; 72 L. J. K. B. 805; and, generally, as to the principle applicable in assessing the compensation, *Joicey v. N. E. R.*, 1906, 1 K. B. 195; reversed by C. A., 1907, 1 K. B. 402, but restored by H. L. sub nom. *Eden v. N. E. R.*, 1907, A. C. 400; 76 L. J. K. B. 940; *Rugby Cement Co. v. L. & N. W. R.*, 1908, 2 K. B. 606; 77 L. J. K. B. 1096. As to interest upon compensation money between date of notice and award, *Fletcher v. L. & Y. R.*, 1902, 1 Ch. 901; 71 L. J. Ch. 590 (interest allowed under provisions of a private Act); *In re Richard and G. W. R.*, 1905, 1 K. B. 68; 74 L. J. K. B. 9 (interest disallowed under Railways Clauses Act, 1845).

work the mines and the company have elected not to pay compensation for them, the owner (though himself the vendor of the surface to the company) may work all minerals within the prescribed distance. This working must be in a proper, necessary and usual manner; but it may be by surface or underground operations, and may be carried on although the effect may be to let down and destroy the surface of the railway (*s*). If and when, however, compensation has been tendered, the working will be restrained by injunction (*t*). Further, the company are not bound to give the above counter-notice within the thirty days, but may at any time stop the working on the terms of paying compensation for the minerals then remaining unworked (*u*). The right conferred on a railway company by s. 78 of the Act is purely negative, and could not, it seems, be created by grant (*x*).

Vested support of surface by subjacent minerals.

When a canal company's Act contains similar provisions, the like principles of course apply (*y*); and in the Dudley Canal case (*z*), where the Act provided that, on the canal company's failure to purchase after due notice, the owner might work the mines, so that "in working such mines no injury be done to the said navigation," the Court construed the proviso as referring to extraordinary or unnecessary damage, and not as cutting down the power to work the mines in the usual course. But where the Act contained no clause requiring the mine-owner to give notice of his intention to work the mines or enabling him to work them on the failure of the company to pay compensation, the Dudley Canal case did not apply, and the Court construed a proviso against working the mines so as to "injure, prejudice, or obstruct the canal" in the ordinary sense of those words, and held that the mine-owner's right was to compensation (*a*).

Canal Acts

(*s*) *G. W. R. v. Fletcher*, 1860, 5 H. & N. 689; 29 L. J. Ex. 253; 120 R. R. 786; *G. W. R. v. Bennett*, 1867, L. R. 2 H. L. 27; 36 L. J. Q. B. 133; *Pountney v. Clayton*, 1883, 11 Q. B. D. 820; 52 L. J. Q. B. 566 (a case of superfluous land); *Ruabon Co. v. G. W. R.*, 1893, 1 Ch. 427; 62 L. J. Ch. 483 (a case of open workings).

(*t*) *Smith v. G. W. R.*, 1877, 3 App. Cas. 165; 47 L. J. Ch. 97.

(*u*) *Dixon v. Caledonian and Glasgow and South-Western R. Cos.*, 1880, 5 App. Cas. 820. As to the right to tunnel under the railway, see *Midland R. v. Miles*, 1885, 30 Ch. D. 634; 55 L. J. Ch. 251; 1886, 33 Ch. D. 632; 55 L. J. Ch. 745. And as to claims for prospective injury to mines not taken,

see *Holliday v. Wakefield*, 1891, A. C. 81; 60 L. J. Q. B. 361; *Re Gerard and L. & N. W. R.*, 1895, 1 Q. B. 459; 64 L. J. Q. B. 260.

(*x*) *G. N. R. v. Inland Revenue*, 1901, 1 K. B. 428; 70 L. J. K. B. 336.

(*y*) *Wyrley Co. v. Bradley*, 1803, 7 East. 368; 8 R. R. 612.

(*z*) *Dudley Canal Co. v. Grazebrook*, 1830, 1 B. & Ad. 59; 35 R. R. 212; 8 L. J. K. B. 361. Cf. *Stourbridge Co. v. Dudley*, 1860, 3 E. & E. 409; 30 L. J. Q. B. 108; 122 R. R. 762.

(*a*) *Knowles v. L. & Y. R. Co.*, 1889, 14 App. Cas. 248; 59 L. J. Q. B. 39; *Glamorganshire Co. v. Nixon's Co.*, 1901, 85 L. T. 53; cf. *Cromford Co. v. Cutts*, 1848, 5 Rail. Cas. 442; 90 R. R. 857; dist. *Chamber Co. v. Rochdale Co.*,

Vertical support of surface by subjacent minerals.

Other Acts.

Somewhat similar questions may arise under the Waterworks Clauses Act, 1847 (*b*), the Highways and Locomotives (Amendment) Act, 1878 (*c*), and the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*d*).

Civil law.

By the civil law, this right of support from the neighbouring soil was recognized in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support: "If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom" (*e*).

Code Civil.

A similar enactment has been introduced into the French law (*f*). "Whoever digs a well or ditch near a wall, whether party or otherwise, whoever wishes to build against (such wall) a chimney, forge, or oven, to erect a stable against it, or establish a magazine of salt, or any corrosive materials, must leave the interval prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbour." In commenting upon this article of the Code, a learned French author says: "It appears to me, that the principle of this article of the Code (674) should be extended to numerous other cases, which will undoubtedly be settled by particular enactments of the rural laws, and which, until such laws are made, should be decided in conformity with local usages; or, if they are silent, with the precepts of equity. Thus, if an individual makes a fish-pond or lake on his own property, he ought to leave a sufficient extent of land to separate it from his neighbour who has already a similar reservoir." "By parity of reasoning, the owner of land who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his

1895, A. C. 564; 64 L. J. Q. B. 645; and *New Moss Co. v. M. S. & L. R.*, 1897, 1 Ch. 725; 66 L. J. Ch. 381, in which cases the Act contained no prohibition against working the adjacent mines so as to injure the canal. In *Midland R. Co. v. Checkley*, 1867, 4 Eq. 19; 36 L. J. Ch. 380, compensation was allowed in respect of mines beyond the prescribed distance; but possibly this was considered to be payable under s. 60 of the Act.

(*b*) Sects. 18 to 27; *Holliday v. Wakefield*, 1891, A. C. 81; 60 L. J. Q. B. 361. Cf. *Conselt Waterworks Co. v. Ritson*, 1889, 22 Q. B. D. 318; reversed on another point, *ib.* 702; *Manchester Corporation v. New Moss Colliery*,

1908, A. C. 117; 77 L. J. Ch. 392.

(*c*) Sect. 27; *A.-G. v. Conduit Colliery Co.*, 1895, 1 Q. B. at pp. 308, 313; 64 L. J. Q. B. 207.

(*d*) *Jary v. Barnsley Corporation*, 1907, 2 Ch. 600; 76 L. J. Ch. 593. See further upon the subject of this paragraph, above, p. 112.

(*e*) Si quis sepe ad alienum prædium fixerit infoderitque terminum ne excedito; si maceriam, pedem relinquit; si vero domum, pedes duos; si sepulchrum aut scobem foderit, quantum profunditatis habuerint, tantum spatii relinquit; si puteum, passus latitudinem.—Dig. 10, 1, 13, fin. reg.

(*f*) Code Civil, art. 674.

neighbour, and continue to excavate perpendicularly, because his neighbour's land, thus deprived of support, would be in danger of falling in (éboulement) " (g).

Vertical support of surface by subjacent minerals.

SECT. 2.—*Support to Buildings from adjacent Land.*

The rules given ante, pp. 344 et seq., state the natural right of the surface owner to support (as well vertical support from the subjacent soil as lateral support from the adjacent soil) where he has not incumbered the surface by building and so increased the pressure. Where, however, buildings have been erected there is no natural right to the additional support which has become necessary. Thus it was said by Lord Selborne: "Support to that which is artificially imposed upon land cannot exist ex jure naturæ because the thing supported does not itself so exist" (h).

Buildings not entitled by the common law to support.

The above rule as to natural rights of support as regards buildings (independent of any right which may be acquired by enjoyment for the requisite time) appears to have been acted upon in early cases. Thus it was laid down in a very early case: "If A. is seised in fee of copyhold land closely adjoining the land of B., and A. erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B., if B. afterwards dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself that he built his house so near the land of B., for he cannot by his (own) act prevent B. from making the best use of his land that he can" (i).

Wilde v. Minsterley.

In *Wyatt v. Harrison* (k) the declaration stated that the plaintiff was possessed of a certain dwelling-house; that the defendant, in rebuilding his dwelling-house adjoining, dug so negligently, carelessly, and improperly into the soil and foundation of his own dwelling-house, and so near the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the plaintiff's wall gave way and was damaged. To so much of this declaration as "related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil

Wyatt v. Harrison.

(g) Pardessus, *Traité des Servitudes*, 302.

(h) *Dalton v. Angus*, 1881, 6 App. Cas. 792; 50 L. J. Q. B. 689. "The principle appears to apply to subjacent as well as adjacent soil, notwithstanding the dicta in *Rodgers v. Taylor*," 1858,

2 H. & N. 828; 27 L. J. Ex. 173; 115 R. R. 835.

(i) *Wilde v. Minsterley*, 1640, 2 Rolle, Ab. 564, Trespass, Justification, J. pl. 1.

(k) 1832, 3 B. & Ad. 871; 1 L. J. (N. S.) K. B. 237; 37 R. R. 566.

Buildings not
entitled by
the common
law to
support.

*Wright v.
Harrison.*

and foundation of the said dwelling-house of the plaintiff, that by reason thereof," &c., the defendant demurred. Lord Tenterden said: "The question reduces itself to this, whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action; but if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle, Ab. (l). The judgment will therefore be for the defendant" (m).

*Slingsby v.
Barnard.*

In *Slingsby v. Barnard* (n) the action was brought, not for the withdrawal of support to the plaintiff's house, which was stated in the declaration "to be a modern house, but for digging so near to the foundation of the plaintiff's house that the defendants undermined his house (undermine son mese), by reason whereof one-half of the said house fell into the said pit so dug by defendant Hall." In the motion in arrest of judgment, which was made upon entirely different grounds, and refused by the Court, there is no allusion to any claim of support.

*Partridge v
Scott.*

The above principle was acted upon in *Partridge v. Scott* (o), which was an action brought for an injury to the plaintiff's reversion by defendants wrongfully removing the support of the plaintiff's

(l) Trespass, J. pl. 1.

(m) In *Smith v. Martin*, 2 Saund. 394 (cited in argument), the declaration was similar to the one in this case, containing no allegation that the house of the plaintiff was an ancient one; but no point on the law of easements was

raised. See in *Langford v. Woods*, 1844, 7 Man. & G. 625, a count for withdrawing support from an ancient house.

(n) 1 Rolle, Rep. 430; see 6 App. Cas. at p. 742, per Pollock, B.

(o) 1838, 3 M. & W. 220; 7 L. J. (N. S.) Ex. 101; 49 R. R. 578.

premises. The following judgment upon the special case which was stated in the action was delivered by Alderson, B. :—

“ The facts may be shortly thus stated : The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary ; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house, and the Court cannot therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago. Under these circumstances, the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt. Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (*p*) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced. In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants ; unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it had not existed twenty years ; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years ; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the

Buildings not
entitled by
the common
law to
support
*Partridge v.
Scott.*

Buildings not entitled by the common law to support.

Partridge v. Scott.

defendant's land. If the law stood as it did before Lord Tenterden's Act (2 & 3 Will. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that Act, the lapse of time, under these peculiar circumstances, would probably make no difference. For the proper construction of that Act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right; and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point. We think, upon the whole, that the defendants are entitled to our judgment."

Rule in *Dalton v. Angus* that right of support to buildings may be acquired by twenty years' enjoyment.

Early cases.

Palmer v. Fleshers.

But although the surface owner where he has incumbered the surface by building has no natural right to the additional support which has become necessary, it is now settled by the decision of the House of Lords in the leading case of *Dalton v. Angus* (q) that an enjoyment of such additional support for not less than twenty years will be sufficient to confer a right subject only to the conditions which limit all acquisitions of rights by length of enjoyment only.

The decisions before *Dalton v. Angus* may be shortly stated as follows :—

In *Palmer v. Fleshers* (r) the judges in their first resolution say "that if a man being seised of land leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house, and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for everyone may deal with his own to his best advantage; but, semble, that it would be otherwise if the wall or house were an ancient one."

Acquisition of right of support to buildings by enjoyment.

Stansell v. Jollard.

In *Stansell v. Jollard* (s) it was laid down by Lord Ellenborough that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbour's soil, so that his neighbour could not

(q) 1881, 6 App. Cas. 740; 50 L. J. Q. B. 689. See the rule established by this case stated post, p. 370.

(r) 1675, 1 Sid. 167; cited Com. Dig.

Action on the case, Nuisance, C.; above, p. 119.

(s) M. S. 1 Sel. N. P. 457, 11th edit.

dig so near as to remove the support, but that it was otherwise of a house, &c., newly built.

In *Dodd v. Holme* (t) the Court did not pronounce any decided opinion as to the right of support for an ancient house from the adjoining land; but Littledale, J., in the course of the argument, observed: "Suppose the house to have been *substantially* built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though *without actual negligence* on his part, an action would not lie against him?"

In *Hide v. Thornborough* (u) Parke, B., said: "If there was twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." And in *Gayford v. Nicholls* (x) the same judge said: "This is not a case in which the plaintiff has the right of the support of the defendant's soil, either by virtue of a twenty years' occupation or by reason of a presumed grant or presumed reservation, where both houses were originally in the possession of the same owner, for *unless a right by some such means is established* the owner of the soil has no right of action against his neighbour for the proper exercise of his own right."

In *Rowbotham v. Wilson* (y) Bramwell, B., said: "After a house has stood in such a position twenty years, it acquires a right to support from the adjoining land."

All these dicta have reference to the support of the *adjacent* soil; and in the cases of *Humphries v. Brogden* and *Bonomi v. Backhouse*, already cited, will be found dicta to the same effect.

In *Solomon v. Vintners' Co.* (z) doubts are expressed by the Court upon this subject; but it is to be observed that that case was one of a claim for support of one building by another in a state of things caused by an accidental subsidence of the houses, and not the ordinary case of a house built originally upon the edge of land and obviously so as to be affected by the removal of the adjoining land. The authorities referred to by the Court with doubt have reference to such cases as this, and not to such a one as that before the Court;

Acquisition
of right of
support to
buildings by
enjoyment.
Stansell v.
Jollard.
Dodd v.
Holme.

Hide v.
Thorn-
borough.

Gayford v.
Nicholls.

Rowbotham v.
Wilson.

Solomon v.
Vintners' Co.

(t) 1834, 1 A. & E. 493; 40 R. R. 344.

(u) 1846, 2 C. & K. 250; 80 R. R. 841.

(x) 1854, 9 Exch. 708; 23 L. J. Ex. 205; 96 R. R. 925.

(y) 1860, 8 El. & Bl. 140; affd. 8 H. L. C. 348; 27 L. J. Q. B. 61; 112 R. R. 472.

(z) 1859, 4 H. & N. 598; 26 L. J. Ex. 370; 118 R. R. 629.

Acquisition
of right of
support to
buildings by
enjoyment.

*Solomon v.
Vintners' Co.*

*Angus v.
Dalton.*

see the observations of Wood, V.-C., in the case of *Hunt v. Peake* (a) as to this point.

It was laid down in *Bonomi v. Backhouse* (b) that the right of support for buildings, when acquired, is precisely similar in its character to the natural right of support for the soil.

So the authorities stood when the now leading case of *Angus v. Dalton and the Commissioners of Her Majesty's Works and Public Buildings* (c) came to be decided. The action was brought by the owners in fee of a coach factory at Newcastle-upon-Tyne, to recover damages for injuries to their factory caused by the defendants the Commissioners, and by their contractor the defendant Dalton, in excavating the soil of the adjoining property, on which the Probate Office was to be built. It appeared that the plaintiffs' building and the adjoining building on the defendants' land were estimated to be upwards of a hundred years old; that up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling-houses; that in that year the plaintiffs' predecessor in title had converted his house into a coach factory in such a manner as materially to increase the pressure on the borders of his own soil and consequently on the adjoining property; that this had been done without the express assent of the defendants' predecessor, but openly and without any attempt at concealment; that the defendants had pulled down their house and the wall dividing the two properties without injury to the factory; but that, in excavating in their land for the purpose of providing cellarage (which had not previously existed) for the offices to be built, they had dug below the foundations of the plaintiffs' building without leaving sufficient support, and had thus brought the whole building to the ground.

Trial.

At the trial Lush, J., directed a verdict for the plaintiffs for the damages claimed, but left them to move for judgment in order to have the questions of law determined.

Motion for
judgment.

On motion for judgment it was argued for the defendants, first, that the plaintiffs' factory was not entitled to the support claimed; and, secondly, that the Commissioners were not responsible for the negligence of their contractor.

Upon the second point the Court considered itself bound by the decision in *Bower v. Peate* (d) to find against the defendants; and

(a) 1860, Johns. 705; 29 L. J. Ch. 785; 123 R. R. 301.

(b) 1859, E. B. & E. 655; 9 H. L. C. 503; 27 L. J. Q. B. 378; 113 R. R. 799.

(c) 1878-81, 3 Q. B. D. 85; 47 L. J.

Q. B. 163; 4 Q. B. D. 162; 48 L. J. Q. B. 225; *Dalton v. Angus*, 1881, 6 App. Cas. 740; 50 L. J. Q. B. 689.

(d) 1876, 1 Q. B. D. 321; 45 L. J. Q. B. 446.

this finding was ultimately affirmed by the Court of Appeal and the House of Lords. The question so raised is dealt with in a later part of this treatise (e).

Acquisition
of right of
support to
buildings by
enjoyment.

*Angus v.
Dalton.*

But on the first point, which raised the whole question of the law of support, the judges differed. Lush, J., adhering in substance to the view which he had taken at the trial, thought that the plaintiffs ought to succeed; and rested his opinion partly on the doctrine of the presumption of a grant after twenty years' uninterrupted enjoyment and partly on an analogy to the Statutes of Limitation. He thought that the decision in *Bonomi v. Buckhouse* (f) involved the very point in question. But Cockburn, C.J., held that, if any presumption of a grant were derived from twenty years' user, it was open to be rebutted, and that, when it was proved or admitted that no grant or assent was in fact made or given, the presumption was at an end; and further that, the enjoyment not being capable of being interrupted by any reasonable means, no presumption in fact arose. Mellor, J., agreed with the Lord Chief Justice, and accordingly judgment was given for the defendants.

All the judges agreed that the right to support was not an easement within the Prescription Act.

On appeal (g) Brett, L.J., agreed with the majority of the Court below; but Cotton and Thesiger, L.JJ., being of the contrary opinion, the decision was reversed.

Appeal to
Court of
Appeal

Thesiger, L.J., while admitting that the presumption of a lost grant was a presumption, not "juris et de jure," but liable to be rebutted, held that it could not be rebutted by mere proof by the owner of the servient tenement, that no grant was in fact made either at the commencement or during the continuance of the enjoyment; in fact, it "is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct." The cases of *Barker v. Richardson* (h), *Webb v. Bird* (i), and *Chasemore v. Richards* (k), in which a presumption of this nature had been held to be rebutted, "as direct authorities go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of

(e) Below, p. 383.

(f) 1859, E. B. & E. 655; 9 H. L. C. 503; 27 L. J. Q. B. 378; 113 R. R. 799.

(g) 1878, 4 Q. B. D. 162; 48 L. J. Q. B. 225.

(h) 1821, 4 B. & Ald. 579; 23 R. R.

400; above, p. 212.

(i) 1863, 13 C. B. N. S. 841; 31 L. J. C. P. 335; 134 R. R. 756; above, p. 308.

(k) 1859, 7 H. L. C. 349; 28 L. J. Ex. 81; 115 R. R. 187; above, p. 264.

Acquisition
of right of
support to
buildings by
enjoyment.

*Angus v.
Dalton.*

being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all known easements, will prevent the presumption of an easement by lost grant; and, on the other hand, indirectly they tend to support the view that, as a general rule, where no such legal incompetence, physical incapacity, or peculiarity of enjoyment as was shown in those cases exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, 'Qui non prohibet quod prohibere potest assentire videtur.' As to the alleged impossibility or extreme difficulty of obstructing the enjoyment of the right of support, he pointed out that this only exists where the servient tenement, being itself covered with buildings, enjoys a reciprocal benefit from the dominant tenement; and in any case he held himself bound by the authorities not to admit the argument as sufficient.

The judgment of Cotton, L.J., was to the same effect.

None of the Lords Justices adopted the view expressed by Lush, J., that the period of twenty years might be limited for the acquisition of a right to support by analogy to the Limitation Acts (*l*); and none of them seems to have considered that the right might be an easement within the Prescription Act (*m*).

But although, upon the main question, the majority of the Court of Appeal decided in favour of the plaintiffs' contention, the Court was unanimously of opinion that, the construction of the plaintiffs' factory being somewhat unusual, the jury should have been asked to determine whether the weight which had been put upon the adjoining soil was such as the owner of the soil could be reasonably expected to be aware of, and, on this ground, directed the defendants to elect within fourteen days whether they would take a new trial (*n*).

The option was not exercised; and, judgment having been entered for the plaintiffs for £1,943, the amount of damages assessed by a special referee, the defendants appealed to the House of Lords.

The appeal (*o*) was, in the House of Lords, twice argued, the second time before seven judges of the High Court who had not yet been parties to any decision in the case (*p*). The judges, in answering the questions put to them by the House, were unanimous in advising that the judgment of the Court of Appeal was justified by the authorities; and two only of them (*q*) disapproved of the principle underlying

Appeal to
House of
Lords.

*Dalton v.
Angus.*

(*l*) See per Thesiger, L.J., 4 Q. B. D. 170, and per Brett, L.J., ib. 199.

(*m*) Ibid. 170, 196.

(*n*) Ibid. 131, 187, 204.

(*o*) 6 App. Cas. 740; 50 L. J. Q. B.

689.

(*p*) Pollock, B., and Field, Lindley, Manisty, Lopes, Fry, and Bowen, JJ.

(*q*) Lindley and Fry, JJ.

the authorities. But the reasons on which their opinions were based were very diverse. Pollock, B., and Field and Manisty, JJ., did not refer the right to support to any presumption of grant or acquiescence, but treated it as a proprietary right, to be acquired by a de facto enjoyment for twenty years; and the first-named expressly approved of the conclusion arrived at by Lush, J., at the trial, that the rule might be derived by analogy from the Statutes of Limitation. On the other hand, Lindley, J. (with whom Lopes, J., agreed), was of opinion that support was an easement which, after twenty years' open and uninterrupted enjoyment, the Court would presume to have been granted, even though it should be proved or admitted that no sealed or written grant had in fact been executed; and that the law which required the servient owner to remove his soil in order to preserve his unrestricted right to let down his neighbour's house, though it did not "commend itself to common sense," was completely established by authority. Fry, J., felt the same difficulty in approving of the principle of the decisions, holding that "an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, and so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right"; and adding that, as the servient owner cannot, "except by a trespass or an impertinence," ascertain the nature of his neighbour's structure, the incidence of its burden on the soil, or the depth and character of its foundations, the enjoyment is so secret that no right ought to be founded upon it; but he also thought the authorities conclusive against this view being adopted in practice. Lastly, Bowen, J., reverting to some extent to the opinions of the Lord Chief Justice and Brett, L.J., treated the twenty years' rule as a "canon of evidence," and held that twenty years' user, peaceful, open, and as of right, was sufficient ground for inferring a lawful origin of the user, and that the inference could only be met by showing that there was no such lawful origin, either at law (as by grant or covenant), or in equity (as by agreement or acquiescence); he thought the decisions showed that the enjoyment was capable of interruption.

As to the question of notice, upon which the plaintiffs had obtained from the Court of Appeal the option to have the case retried, Lindley, Lopes, and Bowen, JJ., thought that this should have gone to the jury, while the remaining judges considered the question immaterial.

It should be added that Lindley, J., in the course of his opinion (*r*),

Acquisition
of right of
support to
buildings by
enjoyment.

Dalton v.
Angus.

Opinions of
the judges.

Acquisition
of right of
support to
buildings by
enjoyment.

*Dalton v.
Angus.*

discussed the important question, whether the enjoyment of support is not after all rather affirmative than negative, and so capable of interruption by the short method of an action of trespass, and, in the absence of interruption, ripening into an easement under the 2nd section of the Prescription Act. "Support," he said, "even when lateral, involves pressure on and an actual use of the laterally supporting soil. . . . No trace is to be found in our law books of any action at law or suit in equity based upon any wrong done to the owner of the servient tenement ; and the general opinion certainly is, that, in the absence of actual damage to the soil, no such action or suit could be maintained. Upon principle, I confess I do not see why this should be so. If a person builds so near the edge of his own land as to use his neighbour's land to support his house without his neighbour's consent, I do not see why such neighbour should have no cause of action. The enjoyment of light coming across adjoining land, and the enjoyment of the use of such land for support, are in some respects entirely different ; for no use is made of a man's property by opening a window on other property near it, and a right not to be overlooked is not recognized by our law. At the same time, in every case in which the right to lateral support is alluded to, it is treated as analogous to the right to light, and the difference to which I have drawn attention has not been dwelt upon or treated as material. Nevertheless, whatever my own opinion would be, looking at the matter theoretically, I am not prepared to say that an action for damages, or an injunction, could be maintained in such a case as I have supposed. The authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over. If, however, your Lordships should be of a different opinion, I apprehend that it would follow that the Prescription Act (2 & 3 Will. 4, c. 71, s. 2) would apply to and include an easement of lateral support, and the law upon this important subject would then be contained in the provisions of that statute. But all the judges before whom this case has come concur in holding the Prescription Act not to apply ; and, in the absence of authority to the contrary, I am not prepared to differ from them."

On the same subject Fry, J., made the following observations in a contrary sense (s) :—

"It has been argued at your Lordships' bar, that the doctrine (t) applies in its simplest form to the right in question ; for it has been contended that the act of building a house on one piece of land which

(s) 6 App. Cas. at p. 775 ; 50 L. J. Q. B. 689.

(t) Sc. Qui non prohibet quod prohibere potest assentire videtur.

derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that therefore time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbour's soil would no doubt be trespass: but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law, no one could rightly build on the edge of his land unless he built upon a rock; and yet the building walls and other structures on the borders of land is universally recognized as lawful. Nay, more, any erection of a house would give a right of action, not only to the adjoining neighbours, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure, when unattended with ascertainable physical consequences, is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment."

Bowen, J.'s observations on the same point (*u*) appear to indicate that he agreed in principle with Lindley, J.

The House of Lords (*x*) unanimously dismissed the appeal; and it is of importance to notice the grounds upon which their Lordships' opinions in favour of this course proceeded.

The Lord Chancellor (Lord Selborne), after showing that the right of support to buildings was not a natural but a conventional or acquired easement, expressed his agreement with the views of Lindley, J., and Bowen, J., "that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land or building to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral

Acquisition
of right of
support to
buildings by
enjoyment

*Dillon v.
Atkins.*

Opinion of
Lord
Selborne.

(*u*) 6 App. Cas. at p. 784; 50 L. J. Q. B. 689. Selborne, L.C., and Lords Coleridge, Penzance, Blackburn and Watson.

(*x*) The Lords present were Lord

Acquisition
of right of
support to
buildings by
enjoyment.

*Dalton v.
Angus.*

support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight."

From these considerations it followed that the right to support was to some extent affirmative, and so properly the subject, not of covenant only (*y*), but of grant. It was also capable of interruption, if not by action, at least by the removal of the supporting soil; and, if in some cases it did not suit the purpose of the supporting owner to exercise this right of removal, it was the policy of the law that his inaction (whether due to negligence or to his own preponderating interest) should in time confer a possessory title upon his neighbour. The right of support then, being an easement, not purely negative, capable of being granted and also capable of being interrupted, was within the 2nd section of the Prescription Act; and the question of grant or no grant was excluded. And, even though the Prescription Act should not apply, the presumption of a lost grant could not be rebutted by showing that no grant had in fact been made. As to the question of notice, a landowner who sees building operations, or alterations of an existing building, in progress upon the borders of his property, must have imputed to him the knowledge that the building will require fresh support from the adjoining land; and, if everything is done honestly and (as far as possible) openly, he must be fixed with knowledge of the amount of support enjoyed. No question need therefore have been submitted to the jury.

Lord
Penzance.

Lord Penzance expressed the opinion^{ff} that, if the matter were *res integra*, it might properly be held that a building owner acquired, immediately upon erecting a house, the right to have it supported by the adjacent soil; but he agreed with Fry, J., in thinking that length of enjoyment could only confer a title through the acquiescence of another, and that an enjoyment which was both secret and incapable of being interrupted without an unreasonable waste of labour and expense, was no evidence of acquiescence, and should

(*y*) See per Littledale, J., in *Moore v. Rawson*, 1824, 3 B. & C. 340; 3 L. J. K. B. 32; 27 R. R. 375.

not on principle be made the basis of any right. However, he considered that the ruling of Lush, J., was entirely supported by the authorities, and that the appeal should on this ground be dismissed.

Lord Blackburn thought that the fiction of a lost grant, however introduced, was not a rule of evidence which a jury might or might not conform to, but an established doctrine of the Court; and that to refuse to administer such a rule, when established, was at least as much an usurpation of legislative authority as it was at first to introduce it. He did not consider that acquiescence or laches was the sole, or indeed the chief, principle on which prescriptive rights were founded. Prescription, or usucapio, was a matter, not of natural justice, but of positive law, differing in different countries; and the authorities showed that the English law conferred a right after twenty years' enjoyment. The servient owner had notice that some support was required; and this was enough to put him on inquiry.

Lord Blackburn thought it unnecessary to decide the question whether support was within the Prescription Act. But, incidentally, he supplied an answer to the argument drawn by Fry, J. (z), from the impossibility of pushing the doctrine of Lindley, J., to its extreme limits. "The distinction," he said (a), "between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General v. Doughty* (b), where he observes that, if that was the case, there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience it was held expedient that the right of light, which could only impose a burthen upon land very near the house, should be protected where it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb v. Bird* and *Chasemore v. Richards* are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since *Bland v. Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement."

Acquisition
of right of
support to
buildings by
enjoyment.

*Dutton v.
Angus.*

Lord
Blackburn.

(z) Above, p. 367.

(a) 6 App. Cas. at p. 824; 50 L. J.

Q. B. 689.

(b) 1788, 2 Ves. Sen. 453

Acquisition
of right of
support to
buildings by
enjoyment.

Dalton v.
Angus.

Opinion of
Lord Watson.

Lord Watson agreed with Lord Selborne in holding that the right of support to a building, whether lateral or vertical, was a positive easement; being, as he said, probably influenced by the consideration that a decision that the easement was negative would form an unsatisfactory precedent in Scotland, where positive servitudes alone are capable of being acquired by prescription. He thought that no question of fact need have been submitted to the jury.

Opinion
of Lord
Coleridge.

Lord Coleridge did not deliver a detailed opinion, but expressed his concurrence in the judgments of Lords Selborne and Blackburn. He did not say whether he agreed with the former in holding the easement to be a positive one.

The question last referred to must probably be regarded as an open one. It is obvious that a decision that the enjoyment of support to buildings is a positive act, capable of ripening under the Prescription Act into an easement, and capable of being prevented by the short method of an action by the adjoining owner for trespass, would be of the greatest moment to all owners of immovable property, and would render every building operation a matter of great risk and expense. At present the balance of authority, so far as the number of dicta goes, must be held to be against this view (c).

But the decision of the House of Lords may be taken as finally establishing the rule, that twenty years' enjoyment of support to a building, whether from the adjacent or from the subjacent land, being peaceable, open and as of right, will (either by a right springing out of the enjoyment at the common law, or under the Prescription Act, or under the doctrine of lost grant) confer the right to have the support continued; that, if the right is based on the presumption of a grant founded on the enjoyment, the presumption is absolute and cannot be rebutted by showing that no grant has in fact been made; and that, if notice be material, then, in the absence of any wilful fraud or concealment, the outward appearance of the building is sufficient notice to all persons concerned of the amount of support which it requires (d).

Some cases
in which
damages may
be recovered
though house
is modern.

It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building,

(c) But see the judgments in *Union Co. v. London Dock Co.*, 1902, 2 Ch. 557; 71 L. J. Ch. 791.

(d) Compare the judgments of the three Lords Justices in *Union Co. v. London Dock Co.*, ubi sup.

the value of the house falling with the land might, it seems, be recovered as damage resulting from the principal injury (e).

Acquisition of right of support to buildings by enjoyment. Buildings must be kept in repair.

Assuming, however, that a right to the support of the adjacent land has been obtained by the enjoyment of an ancient house, it appears that a condition is imposed upon the party entitled to such support that he shall do nothing within the period requisite for conferring an easement which shall have the effect of increasing the burthen imposed upon his neighbour. Hence, if an excavation be made near an ancient house, which falls immediately afterwards, "if the building fall in consequence of its infirm condition, that would not be a damage by the act of the [defendant (f)] excavator"; but even supposing the building to be so far out of repair that, "in the ordinary progress of decay, it would have fallen in a short time," it appears from the decision in *Dodd v. Holme* (g), "that the neighbour had no right to accelerate its fall by removing its support."

It is obvious that if a party claiming such an easement has, during the period of the acquisition of it, done or omitted to do anything to his own house by which its coherence and capacity to stand unsupported is diminished, or if, by excavating his own soil or other means, he has weakened the support before then afforded by his own soil—so that, to enable it to stand, an additional amount of support is required from the neighbouring land—he has thereby imposed an increased burthen upon it, which there has been no ancient user to oblige the neighbour to submit to. Hence it seems to follow that, if the damage sustained would not have accrued but for the modern excavation or neglect of the party claiming the ease-

No right to impose additional burthen.

(e) See *Wyatt v. Harrison*, 1832, 3 B. & Ad. 871; 37 R. R. 566; 1 L. J. (N. S.) K. B. 237. This has been decided accordingly in *Stroyan v. Knowles* and *Hamer v. Knowles*, 1861, 6 H. & N. 454; 30 L. J. Ex. 162; 123 R. R. 622; and the same principle is recognized by Wood, V.-C., in *Hunt v. Peake*, 1860, 29 L. J. Ch. 785; Johns. 705; 123 R. R. 301; and by Channell, B., in *Richards v. Jenkins*, 1868, 18 L. T. 437; 17 W. R. 30. In *Manchester Corporation v. New Moss*, 1906, 2 Ch. 564, it was proved that the subsidence complained of would have occurred to an equal extent if certain works of the plaintiffs had not been erected on the land. An injunction was granted with an enquiry as to damages, but it does not appear that any directions were given as to whether or not the injury to the plaintiffs' works were to be included in the

damages. *Smith v. Thackerah*, 1866, L. R. 1 C. P. 564; 35 L. J. C. P. 276, which appears to throw some doubt upon the principle, is commented on in *Att.-Gen. v. Conduit Colliery Co.*, 1895, 1 Q. B. at p. 313; and it is noticeable that in that case *Stroyan v. Knowles* does not seem to have been cited. Damages may also be recovered for letting down a modern house where the person excavating in the adjoining land is not the owner of such land, but a trespasser (*Jeffries v. Williams*, 1850, 5 Exch. 792; 20 L. J. Ex. 14; *Bibby v. Carter*, 1859, 4 H. & N. 153). The decision in *Richards v. Jenkins*, ubi sup., appears to rest partly on this ground.

(f) Per Taunton, J., in *Dodd v. Holme*, 1834, 1 A. & E. 506; 40 R. R. 344.

(g) 1834, 1 A. & E. 493; 40 R. R. 344.

Buildings
must be kept
in repair.

ment, he has no right of action, though his house might have stood had there been no such excavation,—as such continuing to stand could only have been caused by receiving a degree of support from the adjoining soil which the owner of it was under no obligation to supply (*h*). In the case of *Dodd v. Holme* this point does not appear to have been distinctly considered.

Buildings
must be
properly
constructed.

The same reasoning would seem to apply to the case of a house originally built in a weak and insufficient manner, in consequence of which it required a greater degree of support than would be requisite for a well-built house. Unless there were some external indication of the weakness of the building, the neighbour would be altogether in ignorance that a greater degree of lateral pressure was exerted than would have been the case, had the house possessed the ordinary degree of coherence of one well built. But, in view of the decision in *Dalton v. Angus*, it is doubtful whether anything short of industrious concealment would in such a case deprive the owner of the building of the benefit of the lapse of time (*i*).

Right to
support of
building by
land may be
acquired by
grant,
express or
implied.

Apart from a title resulting from enjoyment, a title to the easement of support for buildings may be made in other ways. Thus, it follows from the judgments in *Dalton v. Angus* that where the title to land A, on which a building has been or is about to be erected, is severed from the title to the subjacent or adjacent land, the right to have such building supported by the subjacent or adjacent land may be acquired by grant whether express or implied (*k*). When acquired the right is precisely the same as that of support for land (*l*). The implication of grant may be made not only when at the time of the severance land A had buildings standing upon it, but also where it was conveyed expressly with a view to the erection of buildings (*m*).

(*h*) See *Birmingham v. Allen*, quoted above, p. 344, note.

(*i*) In America some of the States deny any right to prescribe for support to buildings, as they deny the right to prescribe for light: "Neither in the case of the window opening out on another man's land, or of a building erected on the dividing line, has the owner committed an act against which his neighbour can protest. He has not touched his property, or invaded any right, or given any cause of action. He had a right to use or build on his lot to the farthest limit of his boundary. He has only done this, and he never had any use or possession or enjoyment of any right, corporeal or incorporeal, belonging to another, to which objection could in any form be made; and it

would therefore be a mistake, as well as an abuse, of the terms licence, grant, and acquiescence, to say he has acquired a right by means thereof from the owner of the adjacent lot. . . . It is a mockery to say he might have dug up his land during the period of prescription": per Trippe, J., in *Mitchell v. Mayor of Rome*, 49 Ga. 19; 15 Am. Rep. 669.

(*k*) *Dalton v. Angus*, 1881, 6 App. Cas. 792, 809; 50 L. J. Q. B. 689.

(*l*) *Ibid*.

(*m*) If buildings or other structures be already erected upon the land at the time of the severance the right of support for them would exist by implied grant (see judgments in *Dugdale v. Robertson*, 1857, 3 K. & J. 695; 112 R. R. 349; *Caledonian R. Co. v. Sprot*, 2 Macqueen, 449; *Richards v. Rose*,

The reservation of such a right may be implied in favour of the grantor where the easement is one of necessity (*n*), but it seems not otherwise (*o*). By reservation.

SECT. 3.—*Support to Buildings by Buildings.*

A question of equal practical importance, but presenting greater difficulties, arises where the owner of one house claims a right to have it supported by the adjoining house belonging to his neighbour. There is no natural right to such support (*p*). But the question arises whether the right can be acquired by prescription or by grant or reservation. Support to buildings by buildings.

The obstacle to the acquisition of this easement by prescription arises from the natural secrecy of the mode of its enjoyment, and the consequent difficulty of showing that it has been had with the knowledge of the owner of the servient tenement. In order to give rise to any question of the existence of this easement, a man must have built to the extremity of his own soil; and supposing him to have built perpendicularly, as he may reasonably be expected to have done, whatever additional pressure may thereby be exerted on the soil, there would be none upon the adjoining house. Supposing, however, that some deviation from the perpendicular should have originally existed, or have been caused subsequently by the imperfect state of the building, but to so small an extent or in such a position as not to be apparent to the owner of the adjoining house, the ignorance of the neighbour would exclude the presumption of that "negligence and patience," from which alone his consent to the imposition of the easement could be inferred.

If, on the other hand, the manner of imposing the pressure be of such a manifest and visible nature as to afford the requisite

1853, 9 Ex. 218; 23 L. J. Ex. 3); and if the surface were conveyed for the express purpose of erecting buildings or any other structure, the right of support would also exist. See judgments in *Caledonian R. Co. v. Sprot*, 2 Macqueen, 449; *North Eastern R. Co. v. Elliott*, 1860, 1 J. & H. 145; 29 L. J. Ch. 808; 128 R. R. 313; 2 De G. F. & J. 423; 10 H. L. C. 333; *Siddons v. Short*, 1877, 2 C. P. D. 572; 46 L. J. C. P. 795; *Rigby v. Bennett*, 1882, 21 Ch. D. 559; *North British R. v. Turners*, 1905, 6 F. 900.

The judgment of Wood, V.-C., in the North Eastern Railway case contains an exposition of the whole law on this

subject; and, as he points out, the right acquired in this manner would not include a right to the continuance of a state of things, though of long standing, clearly of a temporary and accidental character, as, ex. gr., the additional support to the surface caused by the filling of a mine with water by drowning.

(*n*) *Sherbrook v. Tufnell*, 1882, 46 L. T. 886.

(*o*) *Union Co. v. London Dock Co.*, 1902, 2 Ch. 557; 71 L. J. Ch. 791. See the judgment of Parker, J., in *Jones v. Prichard*, 1908, 1 Ch. 636; 77 L. J. Ch. 405.

(*p*) See *Southwark Co. v. Wandsworth Board*, 1898, 2 Ch. 612; 67 L. J. Ch. 657.

Support to
buildings by
buildings.

indication to the adjoining owner, it would appear that an easement of this kind may be acquired in the same manner as any other easements ; as, for instance, where a beam is inserted in the wall of the neighbour's house. But in this case an objection to the acquisition of an easement by prescription would arise from the difficulty on the part of the servient owner in resisting the right thus sought to be acquired.

The right of support in cases of this nature was distinctly recognized in the civil law (*q*).

Easement of
support by
adjacent
building
can be
acquired by
prescription ;

According to recent decisions the right of support for one building by an adjacent building is similar to the right of support for a building by land (*r*). Such a right may in the case of buildings belonging to different owners be claimed by prescription (*s*), in which case the enjoyment must have been as of right (*t*), and therefore open (*u*).

or by
implied
grant or
reservation.

The right may also be claimed by implied grant or reservation. Thus, "where a landowner erects on his land several adjoining houses, necessarily requiring mutual support, and sells one of the houses retaining the other, there as against himself he grants the right of support, and on his own part also reserves the right" (*v*). Again, where a man grants a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between his own house and an adjoining one to be built by the grantee the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall which is comprised in the grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected ; and similarly the grantee's moiety of the

(*q*) Binas quis ædes habebat una contiguatione tectas ; utrasque diversis legavit : dixi, quia magis placet tignum posse duorum esse, ita ut certæ partes cujusque sint contiguationis, ex regione cujusque domini fore tigna ; nec ullam invicem habituros actionem, "jus non esse immissum habere." Nec interest, pure utrisque, an sub conditione alteri ædes legatæ sint.—Dig. 8, 2, 36, de serv. præd. urb.

(*r*) *Lemaitre v. Davis*, 1881, 19 Ch. D. 290 ; 51 L. J. Ch. 173.

(*s*) *Lemaitre v. Davis*, sup. ; *Waddington v. Naylor*, 1889, 60 L. T. 480.

(*t*) *Tone v. Preston*, 1883, 24 Ch. D. 739 ; 53 L. J. Ch. 50.

(*u*) *Lemaitre v. Davis*, sup. ; *Solomon v. Vintners' Co.*, 1859, 4 H. & N. 601 ; 26 L. J. Ex. 370 ; 188 R. R. 86 ; *Gateley v. Martin*, 1900, 2 I. R. 269 ; *Union Co. v. London Dock Co.*, 1902, 2 Ch. 557 ; 71 L. J. Ch. 791.

(*v*) *Richards v. Rose*, 1853, 9 Ex. 221 ; 23 L. J. Ex. 3 ; 96 R. R. 675. See *Howarth v. Armstrong*, 1897, 77 L. T. 62

wall will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall (*x*).

Support to buildings by buildings.

Again, as regards support for one building by a subjacent building, it has been held that where the owner of building A and building B which is subjacent to A and supports it demises A, the lessor cannot withdraw the support, but there is no covenant implied by him to repair B (*y*).

Support by subjacent building.

The current of early decisions on the above points may be stated more at length as follows :—

From the expression in the judgment in *Peyton v. London* (*z*), “it did not appear whether the two houses had been erected at the same time, and whether the freehold in both had originally belonged to the same person,” Lord Tenterden seems to have inclined to the opinion that, had such a union existed, an easement of support would have arisen upon their severance ; and to the same effect are the dicta of Lord Justice Thesiger in *Angus v. Dalton* (*a*) and *Wheeldon v. Burrows* (*b*). Such an acquisition of an easement has obviously no connection with the title by prescription, but rather results from the doctrine of the disposition of the owner of two tenements.

It might also be urged that such a right to support would be an easement of necessity, as, without it, the house granted or retained could not exist (*c*).

The more ancient authorities appear to be altogether silent upon the point whether such an easement can be acquired by prescription. In *Peyton v. London* (*d*), the first case which bears directly upon the subject, the declaration was unfortunately so ill drawn that the Court were not called upon to decide the question of right ; and, indeed, in argument hardly any attempt appears from the report to have been made to maintain the right to support upon the general principles of the law of easements. The following judgment was delivered by Lord Tenterden :—

Early cases.

Peyton v. London.

“This was a special action upon the case brought by the plaintiffs, as the reversioners of a house in Cheapside, in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the

(*x*) Per Parker, J., *Jones v. Prichard*, 1908, 1 Ch. 636 ; 77 L. J. Ch. 707.

(*y*) *Colebeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234, 243 ; 45 L. J. Q. B. 225.

(*z*) 1829, 9 B. & C. 736 ; 7 L. J. K. B. 322 ; 33 R. R. 311.

(*a*) 1878, 4 Q. B. D. 167 ; 48 L. J. Q. B. 225.

(*b*) 1879, 12 Ch. D. 59 ; 48 L. J. Ch.

853. Cf. the judgment in *Dugdale v. Robertson*, 1857, 3 K. & J. 695 ; 112 R. R. 349.

(*c*) See *Richards v. Rose*, ante, p. 156 ; and *Suffield v. Brown*, 1864, 4 De G. J. & S. 185 ; 10 Jur. N. S. 114 ; 33 L. J. Ch. 249 ; 146 R. R. 267 ; ante, p. 157.

(*d*) 1829, 9 B. & C. 725 ; 7 L. J. K. B. 322 ; 33 R. R. 311.

Support to
buildings by
buildings.

*Peyton v.
London.*

defendants' house. The first count of the declaration, after alleging the plaintiffs' interest in a house which in part adjoined a house of the defendants, charged that the defendants unskilfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs' house, without shoring up, propping, or duly securing the plaintiffs' house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants' house ; so that for want of such shoring up, propping, or otherwise duly securing the plaintiffs' house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants' house, that the plaintiffs' house was by such negligent, unskilful and improper conduct greatly weakened, ruined and dilapidated, and in part fell down.

“ The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own ; the second count is more general, but it does not charge the want of notice of taking down the defendants' house in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of : and, therefore, in our opinion the action cannot be maintained upon the want of such a notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand ; upon which point of law we are not, in this case, called upon to give any opinion.

“ I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

“ At the trial of the cause before me at Guildhall it appeared upon the plaintiffs' evidence that the two houses were very old and decayed, the party-wall between them weak and defective ; that for some time pieces of timber, called struts, have been carried across

Honey Lane, on the east side whereof the defendants' house was situate, to the opposite house on the west side of that lane ; that the plaintiffs' house adjoined the defendants' eastward ; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way ; that when the defendants' house was taken down these struts were necessarily removed, and no other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall ; and if either of these measures had been adopted the plaintiffs' house might have stood ; but that, neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times ; from their construction it seems likely that they were built at or about the same time. The freehold was then in different hands ; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures ; if the proof of the facts either way would have aided the plaintiffs' case, it was their duty to give the proof.

" It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so ; but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with regard to the party-wall, and a notice of rebuilding the party-wall under the Act of Parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiffs' house.

" Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within ; and upon that ground I directed a nonsuit.

" A rule to show cause for setting aside the nonsuit was granted in the ensuing term ; cause was shown, and the matter very well argued on both sides during the present term. We have considered of it ; and adverting to the facts proved, and to the want of evidence

Support to
buildings by
buildings.

*Pepton v.
London.*

Support to
buildings by
buildings.

Peyton v.
London.

from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule, therefore, must be discharged" (e).

Brown v.
Windsor.

Brown v. Windsor (f) was an action on the case for negligently and carelessly excavating on the defendant's own land, and thereby withdrawing the support from the plaintiff's house which the declaration alleged it was entitled to. It appeared that, for about twenty-six years, the plaintiff had rested his house upon a pine end wall belonging to the defendant; this had been originally done by permission of the owner of the wall; the defendant, by excavating near his pine end wall, caused it to sink, and thereby injured the plaintiff's house, which rested against it. The jury found that this excavation was made in a careless and unskilful manner; a motion was afterwards made to set aside the verdict; but, after argument, the Court of Exchequer (g) held that the action could be supported. This case cannot be cited as a direct authority upon the point in question, as the Court there clearly assumed that the plaintiff was entitled to the support he claimed: thus, Garrow, B., said: "When such an easement is given, the owner of the premises can only use his rights subject to such easement; and I am of opinion that the allegation as to the easement was established in evidence." "If a party," said Vaughan, B., "grant an easement like the present, and then act so that it cannot be enjoyed, an action lies."

Solomon v.
Vintners' Co.

In *Solomon v. Vintners' Co.* (h) the Court of Exchequer seems to have been of opinion that, if a house gets out of the perpendicular and leans on the adjoining house for twenty years, no right of support would be acquired under such circumstances; but that, if the facts of the case had raised the point, they might have decided that it would, in deference to *Stansell v. Jollard*, *Hide v. Thornborough*, and the dicta in *Humphries v. Brogden*. It may be observed that these decisions and dicta, mentioned by the Court of Exchequer, appear to have no reference to a state of things arising from accidental circumstances and from which no grant can properly be implied; and that any claim of a right of support arising from an accidental sinking of the house might therefore be disposed of without at all interfering with the authority of the decisions and dicta in question.

(e) See also *Walters and Others v. Pfeil*, 1829, 1 Moo. & Mal. 362; *Massey v. Goyder*, 1829, 4 C. & P. 161; 34 R. R. 782.

(f) 1830, 1 Cr. & J. 20.

(g) Garrow, B., Vaughan, B., and Bolland, B.

(h) 1859, 4 H. & N. 585; 26 L. J. Ex. 370; 118 R. R. 629; above, p. 361.

In *Lemaitre v. Davis* (*i*) the plaintiff alleged that the eastern wall of his tenement had for more than sixty years depended for support upon the western wall of the defendants' house, and claimed damages for the loss of this support. Hall, V.-C., held, upon the facts, that the support claimed had been enjoyed, and that the defendants had had actual knowledge of the enjoyment, and decided that the plaintiff had acquired the easement claimed by virtue of the Prescription Act. He could see no sound distinction between the cases of support by land and support by buildings, and therefore thought the case was covered by *Dalton v. Angus*. This is an express decision that the easement may be acquired by enjoyment alone, provided that the enjoyment be open, peaceable, and as of right. But the analogy to the right of support from the adjacent soil, on which the decision rests, may be thought to be somewhat incomplete, and the case may yet be reviewed by a Court of Appeal.

Support to
buildings by
buildings.
Lemaitre v.
Davis.

In *Tone v. Preston* (*k*) Denman, J., adopted the principles laid down by Hall, V.-C., in *Lemaitre v. Davis*, but held that in the particular case before him the enjoyment had been precarious.

Tone v.
Preston.

In *Gateley v. Martin* (*l*), the plaintiff and a certain company were owners of adjoining houses in the same street. The action was brought for the loss of support to the plaintiff's house caused by the removal by the defendants, who were contractors for the company, of the company's adjoining house. It was found by the jury that the plaintiff's house had uninterruptedly enjoyed support from the adjoining house for twenty years before the action, but the jury was unable to agree whether such enjoyment was open and notorious. On these findings the judge gave judgment for the defendants. A motion to set the judgment aside was dismissed, and Palles, C.B., who delivered the judgment of the Court (*m*), after referring to *Lemaitre v. Davis*, and quoting a passage from the judgment of Hall, V.-C., said: "There the enjoyment of the easement was open and known. In the present case there is no evidence to show that it was known, or reasonably could have been known, to the owner of the alleged servient tenement that his house, in fact, afforded support to that of the plaintiff."

Gateley v.
Martin.

In *Union Co. v. London Dock Co.* (*n*) a right of support was claimed for a dock by means of tie-rods passing under the ground and fastened to piles which were driven into the soil of an adjoining

Union Co. v.
London
Dock Co.

(*i*) 1881, 19 Ch. D. 281; 51 L. J. Ch. 173.

(*k*) 1883, 24 Ch. D. 739; 53 L. J. Ch. 50.

(*l*) 1900, 2 I. R. 269.

(*m*) Palles, C.B., and Gibson and Madden, JJ.

(*n*) 1902, 2 Ch. 557.

Support to
buildings by
buildings.

*Union Co. v.
London
Dock Co.*

wharf. The dock and wharf had formerly belonged to the same owner, who had put in the tie-rods in 1860. In 1877 the wharf was conveyed to the plaintiffs by the then owners, without any express reservation of a right of support to the dock. In 1886 the same owners conveyed the dock to the defendants' predecessors in title. The defendants claimed the right to support by implied reservation, and also as a prescriptive easement; but it was held by a majority of the Court of Appeal (*o*) that the claim failed on both grounds—as to the claim by implied reservation on the ground that the right claimed was not an easement of necessity, and as to the claim based upon prescription on the ground that the enjoyment had been *clam*. The following passage occurs in the judgment of Romer, L.J.: “Now, on principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.” His Lordship referred to the speeches of Lord Selborne, Lord Penzance, and Lord Blackburn in *Dalton v. Angus*. In the course of the judgment of Stirling, L.J., he remarks: “I think that *Dalton v. Angus* establishes that there must be some knowledge, or means of knowledge, on the part of the person against whom the right is claimed.”

Vaughan Williams, L.J., who dissented from the judgment of the majority of the Court, whilst recognizing the rule that any right over the tenement granted must be expressly reserved in the grant, thought that the tie-rods formed a corporeal part of the dock, and were reserved with it as being appurtenant thereto. On the question of the prescriptive right, he referred to the remarks of Bramwell, B., in *Solomon v. Vintners' Co.*, to the effect that the enjoyment must be of right, which it cannot be unless openly and visibly enjoyed, and continued: “Bramwell, B., is speaking of a weakly built house gradually coming to lean against some adjacent house. Such support is manifestly not visible in the sense in which the support is upon some structure or some part of an adjacent house which is intentionally appropriated as a means of support. Such a case seems, whatever may be the case where the support is by one house coming in course of time to lean against another, clearly to fall within the Prescription Act (2 & 3 Will. 4, c. 71). In the case of an artificial support, such as there is in the present case, I shall

(*o*) Romer and Stirling, L.JJ.

assume, notwithstanding the observations of Lord Blackburn in *Dalton v. Angus*, that acquiescence, and therefore knowledge, or means of knowledge, is the basis of the easement, whether the right of support is based on the Prescription Act or on the fiction of lost grant. I agree, speaking of easements generally, that mere enjoyment is not sufficient to create the prescriptive right. This is only true in respect of the right to light. In order to gain for the owner of the land by enjoyment a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is, or ought to be, known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him. See the summary of the first argument in the House of Lords mentioned by Lord Blackburn in his speech in *Dalton v. Angus*. But in the case of easements of support by artificial means, expressly adopted for the purpose, which encroach upon adjacent land by buildings or by structures of any sort, such as the wharf and dock respectively in the present case, I think that the interest of the community, and especially of the inhabitants of large towns, requires that those who occupy adjacent buildings or structures should be taken to be warned of the inherent probability of one building or structure being connected with and supported by some adjacent structure or building, and that this is especially so in a case where the owner of the alleged servient tenement is aware that that tenement, as well as the alleged dominant tenement, at the time of the construction of the structure on the dominant tenement, belonged to one and the same owner. In such a case it seems to me that a very little ought to put the owner of such a tenement upon enquiry, and that if he makes no enquiry knowledge ought to be imputed to him. He is at least in the possession of knowledge which ought to put him on enquiry. Indeed, it appears both from the passage about the relation of acquiescence to prescription which I have quoted from Lord Blackburn's judgment, and from the summary which I have quoted, that proof of actual knowledge is not essential to acquiescence. It is sufficient if the owner of the servient tenement ought to have known. It is sufficient if he had the means of knowledge. This makes the user open."

Support to
buildings by
buildings.
Union Co. v.
London
Dock Co.

The questions whether in such cases as that put in the judgment in *Solomon v. Vintners' Co.*, where the tenement actually leans over the boundary of the adjacent property and rests upon the neighbouring tenement, the easement claimed is a negative or a positive easement, and whether any right could be acquired to such an easement

Whether
easement
negative.

Whether
easement
negative.

under Lord Tenterden's Act, depend upon the same considerations as were advanced in the judgments in *Dalton v. Angus* (p). In these respects no valid distinction exists between the case where a house actually leans out of the perpendicular upon the adjacent house, and where it is constructed upon a piece of land, so that the removal of the subjacent land must cause its fall.

Limitation of
actions.

It appears from the arguments in some cases to have been supposed that, if the right of support for the soil, or the acquired right of support for buildings thereupon, had been held to be a positive easement giving the owner of the soil a right of action when so much of the adjacent soil had been removed that it could be found as matter of fact that insufficient support had been left, though no damage had yet actually occurred, then, as under the Statutes of Limitation time must begin to run in respect of that cause of action from the time when such a state of things arose, no right of action would exist for a subsidence occurring more than six years after the removal of the soil which ultimately caused it. It is hardly necessary to point out that this is not a well-founded notion. For, in the supposed case, the easement of the right of support would be an incorporeal hereditament in fee continuing to exist, and binding the successive owners of the servient tenement; and it never has been suggested that there is no remedy for the present infringement of an existing easement, merely because the owner of it has abstained for six years from bringing an action for a former infringement of it (q).

On the other hand, questions of great difficulty will arise in the present state of the law in actions for subsidence caused by the acts of persons who have long ceased to be connected with the land (r).

Tigni immit-
tendi.

By the civil law two servitudes were recognized, the "servitus tigni immittendi" and the "servitus onera vicini sustinendi," both belonging to this latter class of support of one house from the adjoining house (s); the former imposed the liability of support alone, while the latter also imposed the anomalous obligation of repair on the servient tenement. But even this, the most oppressive servitude known to the law, allowed the servient owner to pull down his house for the purpose of repair, without propping up the dominant tenement, no matter what danger he thereby exposed it to.

Onera vicini
sustinendi.

(p) Above, p. 368.

(q) See *Darley Main Co. v. Mitchell*, 1886, 11 App. Cas. 127; 55 L. J. Q. B. 529; and above, p. 346.

(r) See, e.g., *Greenwell v. Low Beechburn Co.*, 1897, 2 Q. B. 165; 66 L. J. Q. B. 643; *Hall v. Norfolk*, 1900, 2 Ch.

493; 69 L. J. Ch. 571.

(s) Item urbanorum prædiorum servitutes sunt, ut vicinus onera vicini sustineat; ut in parietem ejus liceat vicino tignum immittere.—Inst. 2, 3, 1. Vide post, Incidents of Easements.

SECT. 4.—*Negligence (t).*

In the cases as to the right of support to land and houses from the soil and buildings adjoining, stress has been laid upon the negligence imputed to the party charged; and misapprehension appears to have prevailed with reference to this point. This has probably arisen from the want of precision in the use of the term "negligence," which per se is insufficient to express the distinction between negligence in law and negligence in fact.

Negligence in law is always actionable, but uncertainty appears to exist as to the cases in which negligence in fact will afford foundation for a right of action. If a householder has a right of support as an easement, and his neighbour invades it, the neighbour is liable to an action—no matter how carefully he may have done the act complained of. If the householder has no such easement, the question whether the neighbour is liable for the damage resulting from his negligence in fact has been much discussed (*u*).

The first branch of this proposition appears sufficiently obvious. It has been recognized as law in many ancient decisions that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control (*x*).

Negligence in law and in fact.

Negligence in law always actionable.

Not clear whether negligence in fact may not be so.

Negligence in law: e.g., where injured party was entitled to an easement.

(*t*) As the law of negligence is only indirectly connected with the subject-matter of this treatise, only such references have been added as relate closely to the law of easements. The reader is referred to the text-books dealing with the general subject of Negligence.

(*u*) In the old digests, under the head of "Actions on the Case for Negligence," are ranged instances of neglect or breach of duty, in which the proper question for the jury would be simply whether the defendant had done or omitted to do some act, or some result was the consequence of his act, and not whether he had been guilty of negligence. In such cases it was the practice, in conformity with the precedents (see, however, *Smith v. Martin*, 2 Wms. Saund. 400), to allege negligence in the declaration, partly, perhaps, to show that the count was in case not trespass, partly because of the unsettled state at the time of the law upon the subject. But it is now clear that the allegation of negligence is unnecessary in such cases. Thus in *Bibby v. Carter*, 1859, 4 H. & N. 153, a count for taking away support was held good on demurrer,

though negligence was not alleged; and in *Humphries v. Brogden*, 1848, 12 Q. B. 739; 20 L. J. Q. B. 10; 76 R. R. 402, the count alleged negligence, and, though negligence was not proved, the plaintiff was held to be entitled to recover on it. "If the plaintiff was entitled to the support of the defendant's land, and was deprived of it, the absence of negligence is immaterial" (*Brown v. Robins*, 1859, 4 H. & N. 193; 28 L. J. Ex. 250; 118 R. R. 382; *Hamer v. Knowles*, 1861, 6 H. & N. 454; 30 L. J. Ex. 102; 123 R. R. 622; *Hunt v. Penke*, 1860, Johns. 705; 20 L. J. Ch. 785; 123 R. R. 301).

Mr. Gale's heading of "Negligence in Law" appears to include two classes of cases: (1) cases of trespass and of disturbance of easements, and (2) breaches of absolute duties attached to certain circumstances, such as the custody of fire or other dangerous substances. Neither class necessarily involves negligence in the popular sense of the word.

(*x*) In the earlier editions of this treatise this passage was illustrated by reference in the text to the following authorities:—6 Edw. 4, 7, pl. 18, cited

Negligence
in law.
Civil law.

The civil law appears to agree with these authorities: "If from the roof of a house, tiles thrown down by the wind should cause damage to a neighbour, the owner of the house is liable if it happen through any defect of the house; but not if it happens through the violence of the winds or other act of God—*quâ aliâ ratione quæ vim habet divinam*." And the reason is given for the limitation of this rule: "Without this restriction the law would be unjust; for it is impossible to make a building so strong as to resist the force of a river, the sea, a tempest, a fire, or an earthquake" (y). The only exception mentioned in another place is inevitable accident (z). This is expressed in our law by the maxim "*Sic utere tuo ut alienum non lædas*"—a maxim equally applicable to an easement, when once legally acquired, as to any of the rights of property instanced in these decisions. It can scarcely be contended that the careful manner in which a wall was built could be any defence for the obstruction of an ancient window, if such be the consequence of its erection; or that an excavation, which caused the fall of an ancient house, could be justified on the ground that all possible precaution was taken to guard against such an accident.

Negligence in
fact: e.g.,
where
injured party
was not
entitled to an
easement.

The further question remains to be considered whether a man acting in the exercise of his undoubted rights of property, and doing damage to his neighbour which under some circumstances might be justifiable, is liable to an action if the damage might have been prevented by the use of reasonable care on his part.

This question also turns upon the application of the maxim "*Sic*

in *Scott v. Shepherd*, 1783, 2 W. Bl. 895; 1 Sm. L. C., 11th ed., p. 454; its effect stated in *Smith v. Kenrick*, 1849, 7 C. B. 563; 18 L. J. C. P. 172; 78 R. R. 745; *Weaver v. Ward*, Hobart, 134; 1 Rolle, Ab., tit. Action sur Case, B. p. 1; *Turberville v. Stampe*, 1698, 1 Ld. Raym. 264; Comyns' Digest, Action upon the case for misfeasance, A. 4; *Sutton v. Clarke*, 1815, 6 Taunt. 44; 16 R. R. 563; *Vaughan v. Menlove*, 1837, 3 Bing. N. C. 468; 6 L. J. (N. S.) C. P. 92; 43 R. R. 711. None of these authorities, however, deals directly with the subject of easements, and it is thought unnecessary to retain a discussion of them in the text. Upon the question, see Broom's Legal Maxims, 7th ed., p. 281, "*Sic utere tuo ut alienum non lædas*."

(y) Servius quoque putat, si ex ædibus promissoris vento tegulæ dejectæ damnum vicino dederint, ita eum

teneri, si ædificii vitio id acciderit, non si violentiâ ventorum, vel quâ aliâ ratione, quæ vim habet divinam. Labeo et rationem adjicit: quod si hoc non admittatur, iniquum erit: quod enim tam firmum ædificium est, ut fluminis, aut maris, aut tempestatis, aut ruinae, incendii, aut terræ motûs vim sustinere possit.—Dig. 39, 2, 24, § 4, de damno infecto.

(z) Cassius quoque scribit, quod contra ea damnum datum est, cui nullâ ope occurrî poterit, stipulationem non tenere.—Ib. § 8.

Si damni infecti ædium mearum nomine tibi promisero, deinde hæ ædes vi tempestatis in tua ædificia ceciderint, eaqua diruerint, nihil ex eâ stipulatione præstari; quia nullum damnum vitio mearum ædium tibi contingit; nisi forte ita vitiosæ meæ ædes fuerint, ut quâlibet vel minimâ tempestate ruerint. Hæc omnia vera sunt.—Ib. § 10.

utere tuo ut alienum non ledas " ; and as it is not contested that, ^{Negligence in fact.} in the interpretation of this maxim, " alienum " must be taken to mean " the *rights* of the neighbouring owner," and that, therefore, no action can be maintained unless both injury and damage are sustained, the real point to be decided is —whether, in the absence of any easement restricting the neighbouring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing, which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent.

" If a man sustains damage," says Bayley, J., " by the wrongful act of another, he is entitled to a remedy ; but, to give him that title, these two things must concur —damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient " : *R. v. Pagham (a)*.

Supposing there were two modern houses, and the owner of one were desirous of pulling down his house, the consequence of which, if done in the most convenient and economical manner, would be damage to the neighbouring house, by suddenly withdrawing the support which it had hitherto received, but to which it had no claim ; while a more gradual withdrawal of the support might not have been attended with the same danger ;—has the neighbouring owner any right of action against him if he do not adopt the latter mode ?

Some modern authorities appear to answer this question broadly in the affirmative, and to lay it down as being in every case at large for the decision of the jury whether a reasonable degree of caution has been exercised. The inconvenience that must result from the absence of some more precise and definite rule of law is obvious. A man could scarcely exercise upon his own land one of the most ordinary rights of property without exposing himself to an action for damages, the event of which would depend upon the varying opinion of a jury, founded on the proverbially conflicting testimony of surveyors (*b*).

In answer to the above question Mr. Gale continued as follows : — Where a party chooses to obtain a remedy by his own act, without having recourse to law, a condition is imposed upon him, that he shall use no unnecessary violence. If, therefore, a beam be wrongfully inserted into a neighbouring house, or the outer walls cohere either from the cement or the bricks dovetailing, the party proposing to remove the beam or the bricks improperly inserted in his wall

(a) 1828, 8 B. & C. 355 ; 6 L. J. K. B. 338 ; 33 R. R. 406 ; and the notes to *Ashby v. White*, 1 Sm. L. C., 11th ed. p. 240.

(b) *Walters v. Pfeil*, 1829, 1 Mood. & M. 362 ; *Trower v. Chadwick*, 1836, 3 Bing. N. C. 334 ; 3 Scott, 699 ; 6 L. J. (N. S.) C. P. 47 ; 43 R. R. 659.

Negligence
in fact.

must use no unnecessary violence; and in this respect it must obviously be immaterial whether his object be simply to resist the usurpation, or, in addition thereto, to remove his whole building, either with or without an intention to reconstruct it. Beyond this, it appears difficult to see on what principle any restriction can be imposed upon a party in the free use of his own property, so long as he confines himself strictly within its limits (c).

There are, however, cases which have been adduced as authorities opposed to this doctrine, such as the case in which air has been corrupted by gas and other works; but in these instances there is a clear invasion of common right: and, therefore, the analogy seems to fail. A man requires an easement to entitle him to the lateral passage of light and air; but he requires no easement to give him a right of action against his neighbour who immits upon his land air in a corrupted state, and thus commits a quasi-trespass upon him. The real ground of action in this case is not what he does on his own, but what he does on the complainant's land; not the rendering the air impure, but the transmitting it in that state to his neighbour (d).

The above question was further discussed in *Walters v. Pfeil* (e) and in *Dodd v. Holme* (f). And an important principle bearing on the question was stated in the judgment of the Exchequer Chamber in *Chadwick v. Trower* (g) to the effect that a man was under no obligation towards his neighbour to use any care in dealing with his own property, where he had no notice of the existence on his neighbour's land of structures which might be injured by acts done on his own. Further the Court certainly did not say anything to indicate that any such obligation would exist by law if notice had been given.

(c) See *Davis v. Blackwall R. Co.*, 1840, 1 Man. & G. 799; and *Bradbee v. Christ's Hospital*, 1842, 4 Man. & G. 714; 11 L. J. (N. S.) C. P. 209. See the judgment of Tindal, C.J., in the latter case on the thirteenth objection: "The declaration charges the defendants with conducting themselves so carelessly, negligently, and improperly, in pulling down their house, and in neglecting to use proper precautions in that behalf, that large quantities of brick, mortar, &c., fell from the defendants' house into and upon the plaintiff's house, broke the windows, &c." "The plaintiff, therefore, complains not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner that by those very acts the plaintiff's house was injured." So in *Davis v. Blackwall R.*

Co., the charge was that the defendants caused a house to fall against the plaintiffs. In *Le Lievre v. Gould*, 1893, 1 Q. B. 497; 62 L. J. Q. B. 353, Lord Esher, M.R., said: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

(d) Cf. as to impure water, *Ballard v. Tomlinson*, 1885, 29 Ch. D. 115; 54 L. J. Ch. 454.

(e) 1829, Mood. & M. 362.

(f) 1834, 1 A. & E. 493; 40 R. R. 344. As to this case, see the observations of the Court in *Humphries v. Broyden*, 1850, 12 Q. B. 749; 20 L. J. Q. B. 10; 76 R. R. 402; and in *Gayford v. Nicholls*, 1854, 9 Exch. 708.

(g) 1839, 6 Bing. N. C. 1; 8 L. J. (N. S.) Ex. 286; 43 R. R. 659, 676.

Upon the amount of caution required in cases where no easement exists depends the question whether it is the duty of a party intending to make alterations which may affect his neighbour's premises to give notice of his intention (*h*). The judgment in *Chadwick v. Trower* (*i*) has decided that there is no obligation to give such notice.

Negligence
in fact.

The general rule of law upon this subject is thus laid down by Bracton: "Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum ubi quis fecerit aliquid in suo injustè—contra legem vel contra constitutionem, prohibitus a jure. Si autem prohibere a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino" (*k*).

"An action does not lie for an act not prohibited by law; as if a lessee at will, by his negligence, burn his house, an action on the case does not lie (at the suit of the landlord), for the law does not punish him for permissive waste" (*l*); if, however, the fire be transmitted beyond the bounds of his property, and communicate to the adjoining house, he would have been liable at common law (*m*).

Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary violence, there seems nothing to take the above cases out of the rule before adverted to—"that a party confining himself within the limits of his own property may deal with it as he will" (*n*).

(*h*) See *Massey v. Goyder*, 1829, 4 C. & P. 161; 34 R. R. 782.

(*i*) 1839, 6 Bing. N. C. 1; 8 L. J. (N. S.) Ex. 286; 43 R. R. 659, 676. See *Fairbrother v. Bury*, 1889, 37 W. R. 544.

(*k*) Lib. 4, f. 221 a.

(*l*) *Countess of Shrewsbury's Case*, 1738, 5 Rep. 13 b.

(*m*) *Turberville v. Stamp*, 1 Ld. Raym. 264.

(*n*) This view is supported by *Gayford v. Nicholls*, 1854, 9 Exch. 702, in which, the plaintiff being in part for negligently taking away the support of a modern house, the judge was held to have misdirected the jury in leaving to them the question of negligence. In several modern text-books, not including Wms. Saund. (see vol. 2, 400, n. (a), of that invaluable work, 2 Notes to Saund. 802), it is laid down, without further authority than the cases above distinguished, by the learned editors that an action is maintainable against a landowner for negligence in removing the support afforded by his land to the modern house of his neighbour. This may to some extent be attributable to

vagueness in the use of the relative term "negligence" (per Erle, C.J., 29 L. J. C. P. 319; Bramwell, B., 1 H. & N. 251; 3 H. & N. 318; Watson, B., 28 L. J. Ex. 250), of which a definition is given by Alderson, B., in *Blyth v. Birmingham Waterworks Co.*, 1856, 11 Exch. 784; 25 L. J. Ex. 212; 105 R. R. 791; and Willes, J., *Vaughan v. Taff Vale R. Co.*, 1860, 5 H. & N. 687, 688; 29 L. J. Ex. 247; 120 R. R. 779. It should seem that, in this class of cases, if the mere removal occasions the fall, the defendant is not liable, however negligent may have been the manner of the removal—for his act was confined to his own land; but if it were not merely the removal or omission to do things to prevent its effect, but the manner of the removal, which caused the fall, then he is liable—for then of necessity his act must have extended beyond his own land, and the force proceeding from it must have entered the plaintiff's land, and actively created there the motion which produced the fall.

Negligence
in fact.

Harris v.
Ryding.

In *Harris v. Ryding* (o) there had been a reservation of the minerals under the land, and the defendant removed them in such a negligent manner that the surface of the earth fell in. In this case it is obvious that there existed the natural right of support for the upper soil from the soil beneath; and therefore the entire removal of the inferior strata, however done, would be actionable if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled (p).

Public
officers.

The cases in which parties acting in a public capacity, and under the limited authority conferred by their office, have been held liable for the injurious consequences of their want of care do not afford any authority upon this subject (q). Whether they are liable for not taking due and proper precautions in doing the acts they are authorized to do, or liable only if they have not acted to the best of their skill and judgment, the principles already adverted to do not appear to apply to them.

Jones v. Bird.

In *Jones v. Bird* (r) an action was brought against the commissioners of sewers for negligently making sewers near the plaintiff's houses, whereby the foundations thereof were weakened, and the walls fell down. It appeared that the sewer, which it was necessary

(o) 1839, 5 M. & W. 60; 8 L. J. (N. S.) Ex. 181; 52 R. R. 632.

(p) See the account of this case given by the Court in *Humphries v. Brogden*, 1848, 12 Q. B. 739; 20 L. J. Q. B. 10; 76 R. R. 402.

(q) See *Stainton v. Woolrych*, 1856, 23 Beav. 225; S. C. 26 L. J. Ch. 300; 113 R. R. 117.

(r) 1822, 5 B. & Ald. 837; 24 R. R. 579. This and the two next cases mentioned in the text will suffice to illustrate the distinction pointed out by the learned author. For more recent authorities upon the subject, see *Whitehouse v. Fellowes*, 1861, 10 C. B. N. S. 765; 30 L. J. C. P. 305; 128 R. R. 919; *Ruck v. Williams*, 1858, 3 H. & N. 308; 27 L. J. Ex. 357; 117 R. R. 697, and the cases there cited; *Southampton Bridge Co. v. Southampton Board*, 1858, 8 E. & B. 801; 28 L. J. Q. B. 41; 112 R. R. 785; *Metcalf v. Hetherington*, 1860, 5 H. & N. 719; *Piggot v. E. C. R.*, 1846, 3 C. B. 229; *Vaughan v. Taff Vale R.*, 1860, 5 H. & N. 679; 29 L. J. Ex. 41; 120 R. R. 772; *Cowley v. Sunderland*, 1861, 6 H. & N. 565; 30 L. J. Ex. 127; 123 R. R. 690; *Whitehouse v. Birmingham*, 1857, 27 L. J. Ex. 25; 114 R. R. 987; *Munley v. St.*

Helens, 1858, 2 H. & N. 840; 27 L. J. Ex. 159; 115 R. R. 842; *Great Western R. of Canada v. Braid*, 1863, 1 Moo. P. C. N. S. 101; 139 R. R. 455; *Mersey Docks Trustees v. Gibbs*, 1864, L. R. 1 H. L. 93; 35 L. J. Ex. 225; 145 R. R. 385; *Hammersmith R. v. Brand*, 1868, L. R. 4 H. L. 171; 38 L. J. Q. B. 265; *Smith v. L. & S. W. R.*, 1870, L. R. 6 C. P. 14; 39 L. J. C. P. 68; *Dunn v. Birmingham Co.*, 1872, L. R. 8 Q. B. 42; 42 L. J. (N. S.) Q. B. 137; *Metropolitan Asylum v. Hill*, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353; *Truman v. L. B. & S. C. R.*, 1883, 11 App. Cas. 45; 55 L. J. Ch. 354; *Evans v. Manchester R. Co.*, 1887, 36 Ch. D. 626; 57 L. J. Ch. 153; *Fairbrother v. Bury*, 1889, 37 W. R. 544; *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588; 63 L. J. Ch. 36; *Jordeson v. Sutton*, 1899, 2 Ch. 217; 67 L. J. Ch. 666; *Canadian Pacific R. Co. v. Parke*, 1899, A. C. 535; 68 L. J. P. C. 89; *Batcheller v. Tunbridge Wells*, 1901, 84 L. T. 765; *East Freemantle v. Annois*, 1902, A. C. 213; 71 L. J. P. C. 49; *Canadian Pacific R. Co. v. Roy*, 1902, A. C. 220; *English v. Metropolitan Water Board*, 1907, 1 K. B. 588; 76 L. J. K. B. 361; *Demerara Co. v. White*, 1907, A. C. 330; 76 L. J. P. C. 54.

to repair, ran immediately adjoining the plaintiff's houses, with a stack of chimneys belonging to one of the houses resting upon the arch of it. It being necessary to rebuild this arch, the defendants, to support the chimneys, placed under them a transum and two upright posts; the chimneys fell, and in consequence of their fall, the houses fell also. Contradictory evidence was given as to whether proper care was taken in supplying the place of the arch. It further appeared that there was no specific notice given to the owner of the house to which the chimneys belonged of the danger in which they would be placed. But a general notice was given to the inhabitants of the houses that the sewer was repairing; the jury having found a verdict for the plaintiff, under the direction of the Chief Justice, a rule was obtained for a new trial, which was afterwards discharged, the Court holding that the commissioners of sewers and agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted. "I told them," continued Abbott, C.J., "that, even if they were of opinion that the stack of chimneys could not, by any shoring up whatsoever, have been prevented from falling, still it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that if they did not do so, they were responsible." "As to the merits of the case," said Bayley, J., "it is contended that the defendants are protected, if they acted *bonâ fide*, and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case" (s).

Negligence in
exercise of a
limited right,
Jones v. Bird.

In *R. v. Pagham* (t) commissioners of sewers, acting *bonâ fide* for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels, and it was held that they could not be compelled to make compensation to the owner of it, or to erect new works for his protection. "I am of opinion," said Lord Tenterden, "that the only safe rule to lay down is this, that each landowner for himself, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the

R. v. Pagham.

(s) *Drew v. New River Co.*, 1834, 6 C. & P. 754.

(t) 1828, 8 B. & C. 355; 6 L. J. K. B. 338; 32 R. R. 406.

Negligence in
exercise of a
limited right.
R. v. Payham.

case requires, leaving it to others, in like manner, to protect themselves against the common enemy" (u). "It seems to me," said Bayley, J., "that every landowner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary for the land intrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act bonâ fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here the party may have sustained damage, but the commissioners have done no wrong. The right which each landowner has, is to protect himself, not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners." In this case it was in fact held that the commissioners had, with respect to making defences against the sea, the same right as the owner of the land; and that as every owner has, as incident to the property, the right of doing whatever may be requisite for its protection from the incursions of the sea, they were not liable for the injury resulting from the erection of such defensive works.

Civil law.

The civil law recognized the same distinction between acts of self-defence and ordinary acts in the use of property (x).

The Grocers' Co. v. Donne.

In *Grocers' Co. v. Donne* (y) Tindal, C.J., said: "The declaration states that the commissioners wrongfully and injuriously did make, cut and dig a certain shaft, sewer, gutter and ditch, near unto an

(u) See *Smith v. Kenrick*, 1849, 7 C. B. 515; 18 L. J. C. P. 172; 78 R. R. 745.

(x) Idem Labeo ait, si vicinus flumen (aut) torrentem averterit, ne aqua ad eum perveniat, et hoc modo sit effectum ut vicino noceatur, agi cum eo aquæ pluviae arcendæ, non posse, aquam enim arcere, hoc est, curare ne influat; quæ sententia verior est, si modo non hoc animo fecit ut tibi noceat, sed ne sibi noceat.—Dig. 39, 3, 2, § 9, de aq. et aq.

pl. arc.

Aggeres juxta flumina in privato facti, in arbitrium aquæ pluviae arcendæ veniunt, etiamsi trans flumen noceant; ita si memoria eorum extet, et si fieri non debuerunt.—Ib. 39, 3, 23.

(y) 1836, 3 Bing. N. C. 34; 3 Scott, 356, and cases there cited; 5 L. J. (N. S.) C. P. 307; 43 R. R. 591; and *Stainton v. Woolrych*, 1856, 25 Beav. 225; 26 L. J. Ch. 300; 113 R. R. 111.

ancient messuage and premises in possession of the plaintiffs, and did unskilfully, wrongfully and improperly make, cut and dig the said shaft, sewer, gutter and ditch, so being near unto the said ancient messuage and premises of the plaintiffs as aforesaid, and did also make, cut and dig the said shaft, sewer, gutter and ditch, without shoring up, propping or duly securing the said messuage and premises, or the earth and subsoil supporting the walls of the said ancient messuage and premises of the plaintiffs as aforesaid, in order to prevent the same from being injured by the said making, cutting and digging of the said shaft, sewer, gutter and ditch as aforesaid. As to the want of notice, the arbitrator has raised no question. We must then look at the award, and see whether or not the commissioners have conducted themselves in an unskilful, wrongful, and improper manner in the construction of the sewer in question. The allegation of unskilfulness is negatived by the award, for it expressly finds that the work was done in a skilful and proper manner. But the question is, whether the commissioners are to be mulcted in damages by reason of their having proceeded by a process called tunnelling, in preference to open cutting. If the award had found, that, in the judgment of experienced men, no injury would have resulted to the plaintiffs, had the commissioners proceeded by open cutting, the plaintiffs would have been entitled to a verdict. But the arbitrator finds that there was risk in either way though less from open work than from the other mode; and if the commissioners were bound to pursue that mode which gave the greatest possible chance of escape from injury, the verdict ought to be entered for the plaintiffs. But how are we to say that the commissioners are to be liable in damages, not because they did not perform the work in a skilful, proper and workmanlike manner, but because they did not adopt that course which afforded the utmost possible chance of averting danger? The Court is not to balance possibilities. We are called upon to pronounce a judgment against the commissioners, because, had another mode of operation been resorted to, by some remote possibility the damage of which the plaintiffs complain *might* not have accrued. It seems to me that the plaintiffs can only entitle themselves to a verdict by showing that the injury would not have happened if the sewer had been constructed by open cutting; and consequently the verdict must be entered for the defendant."

Negligence in exercise of a limited right. The Grocers' Co. v. Donne.

Where, however, from the situation of the premises, the acts of the party, though done entirely on his own property, may be productive of injury to the public, he is bound to exercise such a degree

Negligence causing a public nuisance.

Negligence
causing a
public
nuisance.

of care and caution as shall prevent damage to persons exercising, on their part also, reasonable care to avoid the danger (z). But if he has used such due caution, he will not be liable for injury arising from the interference of a wrongdoer (a).

Accordingly, it is the duty of an occupier of premises adjoining a highway to take reasonable care to prevent injury to a member of the public from falling into an unrailed area abutting on the highway (b), or into an excavation adjoining a highway (c), or from an unfastened trapdoor (d). The question what duty is owed to the public by the occupier of unfenced land adjoining or near a highway has been recently reviewed by the House of Lords and the Court of Appeal, the importance of there being an invitation, or no invitation, to enter on the land being pointed out (e). The mere fact of giving a licence to enter would not, it seems, make the occupier responsible (f).

(z) It will be seen that in *Hardcastle v. South Yorkshire R. Co.*, *infra*, the question for the jury was held not to be whether the act was productive of danger to the public. In the case of a dangerous public nuisance, as an obstruction to a way such as renders it impassable with safety, a person who incurs the danger, knowing of its existence, and suffers damage, is not prevented from recovering for the damage, if under the circumstances it was not inconsistent with common prudence to run the risk (*Clayards v. Delhick*, 1848, 12 Q. B. 429; 76 R. R. 305; *Thompson v. N. E. R.*, 1860, 2 B. & S. 106; 30 L. J. Q. B. 67; 127 R. R. 297). As to the doctrine of contributory negligence see 1 Sm. L. C., 11th ed. p. 285.

(a) See *Radio v. L. & N. W. R.*, 1849, 4 Exch. 244; 20 L. J. Ex. 65; 80 R. R. 541.

(b) *Barnes v. Ward*, 1850, 9 C. B. 342; 19 L. J. C. P. 195; 82 R. R. 375.

(c) *Hardcastle v. South Yorkshire Co.*, 1859, 4 H. & N. 67; 28 L. J. Ex. 139; 118 R. R. 331.

(d) *Proctor v. Harris*, 1830, 4 C. & P. 377; 34 R. R. 810. See *Daniels v. Potter*, 1830, 4 C. & P. 262; *Witherley v. Regent's Canal*, 1862, 12 C. B. N. S. 2.

(e) *Cooke v. Midland G. W. R.*, 1909, A. C. 229; 78 L. J. P. C. 76; *Barker v. Herbert*, 1911, 2 K. B. 633; 80 L. J. K. B. 1329; *Latham v. Johnson*, 1913, 1 K. B. 398; 82 L. J. K. B. 258, where a number of the earlier authorities are referred to.

(f) *Hounsill v. Smyth*, 1800, 7 C. B. N. S. 731; 29 L. J. C. P. 203; 121 R. R. 698. Upon the question as to the extent of the dedication which is presumed, see *A.-G. v. Esher Co.*, 1901, 2 Ch. 647; 70 L. J. Ch. 808; *Offin v. Rochford*, 1906, 1 Ch. 342; 75 L. J. Ch. 348; and see *Chorley v. Nightingale*, 1907, 2 K. B. 637; 75 L. J. K. B. 793.

CHAPTER VII.

LEGALIZATION OF NUISANCES WHICH CONSIST OF INFRINGEMENTS OF THE NATURAL RIGHTS OF PROPERTY.

THE term nuisance is applied, in the English law, indiscriminately, both to disturbances of an easement already acquired, and infringements of the natural rights of property, for which an action can be sustained (*a*). Strictly speaking, however, the term nuisance should be confined to the latter class of injuries only—those acts which, though originally tortious, as infringing the common law rights of property, may nevertheless, in process of time, confer a prescriptive title by enjoyment. This distinction may be further illustrated by considering that when the matter of complaint is the disturbance of an easement, the acts done, if allowed to be continued for a certain period, would be evidence to show that no easement existed; whereas, in the case of a nuisance, properly so called, the effect of a similar continuance will be evidence of a right.

Meaning of
nuisance.

It is by no means easy to define in general terms what precise amount of infringement of the natural rights of property is requisite to confer a right of action. There “must, at all events, be some sensible diminution of these rights affecting the value or convenience of the property”; and though certain trades have been declared to be nuisances when carried on in particular situations, yet it appears to be in every instance a question of fact whether such a degree of annoyance exists as can be said to amount to a nuisance (*b*).

What
amounts to
a nuisance.

“Lex non favet delicatorum votis.” According to Knight-Bruce, V.-C., in the case of *Walter v. Selfe* (*c*) (affirmed on appeal), the question in each case is this: “Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people?” “For the purpose of answering this question,” said

(*a*) Compare the judgment of Farwell, J., *Higgins v. Belts*, 1905, 2 Ch. 215; 74 L. J. Ch. 621.

(*b*) *Polsue v. Rushmer*, 1907, A. C.

123; 76 L. J. Ch. 365.

(*c*) 1851, 4 De G. & S. 315; 21 L. J. Ch. 433; 87 R. R. 393.

Warrington, J. (*d*), "I am not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular in reference to the nature of the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations: *Sturges v. Bridgman* (*e*); *St. Helen's Smelting Co. v. Tipping* (*f*). But if, after taking these circumstances into consideration, I find a serious and not merely a slight additional interference with the plaintiff's comfort as above defined, I think it is the duty of the Court to interfere: *Crump v. Lambert* (*g*). This seems to me to be the true result of the authorities."

Elasticity
of test.

It should be noted, however, that the standard of comfort differs according to the situation of the property and the class of people who inhabit it. What would be a nuisance in one locality might not be so in another (*h*). Again, it had been said that the law of nuisance is elastic. "What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise, as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action. This is a question of fact" (*i*).

Substantial injury to the reasonable enjoyment of property may give rise to a nuisance even where there is no house on the property (*k*). But the damage proved must be visible, substantial, and actual; and the Court will not take into account contingent, prospective, or remote damage. "The law does not take notice of the imperceptible accretions to a river-bank or to the sea-shore, although after the lapse of years they become perfectly measurable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of

(*d*) *Rushmer v. Polsue*, 1906, 1 Ch. 236; approved in *H. L.*, 1907, A. C. 122; 76 L. J. Ch. 365.

(*e*) 1879, 11 Ch. D. 865; 84 L. J. Ch. 785.

(*f*) 1865, 11 H. L. C. 642; 35 L. J. Q. B. 66; 145 R. R. 348.

(*g*) 1867, 3 Eq. 409.

(*h*) *Rushmer v. Polsue*, 1906, 1 Ch.

250; 76 L. J. Ch. 365.

(*i*) Per Lord Loreburn, *Polsue v. Rushmer*, 1907, A. C. 122; 76 L. J. Ch. 365, quoting Lord Halsbury in *Colls v. Home Stores*, 1904, A. C. 185; 73 L. J. Ch. 484.

(*k*) *Wood v. Conway*, 1914, 2 Ch. 57; 83 L. J. Ch. 498.

poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected. It would have been wrong, as it seems to me, for this Court in the reign of Henry VI. to have interfered with the further use of sea coal in London because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common sea-port and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes" (l).

The fact that a private nuisance may also be indictable as a nuisance to the public does not prevent any individual from maintaining an action against the party causing it, provided he can prove that he has himself sustained some special injury thereby (m).

The following are instances of nuisances mainly connected with the pollution of air. Proceedings have been taken in respect of a limekiln (n); brickburning (o); mineral refuse burning (p); smelting works (q); chemical or cement works (r); gasworks (s); or in respect of the business of a dyer (t); making varnish (u); a

Nuisances
connected
with pollu-
tion of air.

(l) Per James, L.J., in *Salvin v. North Brancepeth Co.*, 1874, 9 Ch. 709; 44 L. J. (N. S.) Ch. 149.

(m) *Chichester v. Lethbridge*, 1738, Willes, 73; *Crowder v. Tinkler*, 1816, 19 Ves. 621; 13 R. R. 267; *Boyce v. Paddington*, 1903, 1 Ch. 109; 72 L. J. Ch. 28; 1906, A. C. 1. That private injury arising from a public nuisance is the subject-matter of an action for damages is a doctrine as old as any in the common law: per Cur. in *Hardcastle v. South Yorkshire Co.*, 1859, 4 H. & N. 67; 28 L. J. Ex. 139; 118 R. R. 331; and see *Soltan v. De Held*, 1851, 2 Sim. N. S. 145; 21 L. J. Ch. 153; 89 R. R. 245, and *Fritz v. Hobson*, 1880, 14 Ch. D. 542; 49 L. J. Ch. 735.

(n) Assiz. Anno 4, pl. 3, p. 6.

(o) *Bamford v. Turnley*, 1862, 3 B. & S. 66; 31 L. J. Q. B. 286; 129 R. R. 235; *Cavey v. Leadbitter*, 1863, 13 C. B. N. S. 470; 32 L. J. C. P. 104; 134 R. R. 610; *Luscombe v. Steer*, 1867, 15 W. R. 1191; 37 L. J. Ch. 119; *Dunston v. Neal*, 1885, 1 T. L. R.

462.

(p) *Bishop Auckland Board v. B. A. Co.*, 1882, 10 Q. B. D. 138; 52 L. J. M. C. 38; *Fleming v. Hislop*, 1886, 11 App. Cas. 691.

(q) *St. Helen's Smelting Co. v. Tipping*, 1865, 11 H. L. C. 642; 35 L. J. Q. B. 66; 145 R. R. 348; *Tipping v. St. Helen's Co.*, 1865, 1 Ch. 66.

(r) *Umfreville v. Johnson*, 1875, 10 Ch. 580; 44 L. J. (N. S.) Ch. 752; *St. Helen's Co. v. St. Helen's*, 1876, 1 Ex. D. 196; 45 L. J. M. C. 150; *Brook v. Wigg*, 1878, 8 Ch. D. 510; 47 L. J. Ch. 749.

(s) *Broadbent v. Imperial Gas Co.*, 1857, 7 D. M. & G. 436; *Batcheller v. Tambridge Wells*, 1901, 84 L. T. 765; *Wood v. Conway*, 1914, 2 Ch. 47; 83 L. J. Ch. 498.

(t) 2 Rolle, Abt. Nisans, 141, pl. 18. See *Jones v. Powell*, 1629, Hutton, 136; Palmer, 539.

(u) *R. v. Neil*, 1826, 2 C. & P. 485; 31 R. R. 658; *Bigsby v. Dickinson*, 1876, 4 Ch. D. 24; 46 L. J. Ch. 280.

brewhouse (*x*) ; sewage of residence (*y*) ; manure or manure works (*z*) ; or in respect of stables (*a*) ; blacksmith's forge (*b*) ; pigstye (*c*) ; fried-fish shop (*d*) ; slaughter-house (*e*) ; a tan-house (*f*) ; fat melting (*g*) ; a tallow chandler's business (*h*) ; soap boiling (*i*) ; horseflesh boiling (*k*).

In *Jones v. Powell* (*l*) it was said by Dodderidge, J. : "If a chandler erects a melting-house it is a common nuisance. But if a man is so tender-nosed that he cannot endure sea coal, he ought to leave his house."

Smoke ; heat. Proceedings have also been taken in respect of heat (*m*) and in respect of smoke (*n*).

It should be noted that the right of sending on the neighbouring land air impregnated with smoke, to such an extent as to be a nuisance, was recognized as a servitude by the civil law in the same manner as the right of throwing water used in manufactories, or otherwise, upon the adjacent land (*o*), though no such servitude existed where the right was claimed to such an extent only as was necessary for the ordinary purposes of domestic life (*p*).

(*x*) *Jones v. Powell*, 1629, Hutton, 136 ; Palmer, 539. But a brewhouse may not be necessarily a nuisance (*A.-G. v. Cleaver*, 1811, 18 Ves. 218 ; *Gorton v. Smart*, 1822, 1 Sim. & Stu. 66 ; 1 L. J. Ch. 36).

(*y*) *Humphries v. Cousins*, 1877, 2 C. P. D. 239 ; 46 L. J. C. P. 438.

(*z*) *Swain v. G. N. R.*, 1864, 4 D. J. & S. 211 ; 33 L. J. Ch. 399 ; *Knight v. Gardner*, 1869, 19 L. T. 673.

(*a*) *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588 ; 63 L. J. Ch. 36. See *Benjamin v. Storr*, 1874, L. R. 9 C. P. 400 ; 43 L. J. (N. S.) C. P. 162.

(*b*) *Gullick v. Tremlett*, 1872, 20 W. R. 358.

(*c*) *Aldred's Case*, 1611, 9 Rep. 57 b ; 2 Rolle, Ab., Nusans, 141.

(*d*) *Adams v. Ursell*, 1913, 1 Ch. 269 ; 82 L. J. Ch. 157 ; *Errington v. Bist*, 1911, 105 L. T. 373. See *A.-G. v. Plymouth Fish Co.*, 1911, 76 J. P. 19 ; *Braintree v. Boyton*, 48 J. P. 582.

(*e*) *Jones v. Powell*, sup. But a slaughter-house is not necessarily a nuisance (*Rapley v. Smart*, 1894, W. N. 2 ; *Cleaver v. Bacon*, 1887, 4 T. L. R. 27).

(*f*) *Jones v. Powell*, sup. ; *R. v. Pappineau*, 1726, 1 Str. 586.

(*g*) *A.-G. v. Cole*, 1901, 1 Ch. 205 ; 70 L. J. Ch. 148 ; *Morley v. Pragnell*, 1638, Cro. Car. 510.

(*h*) *Bliss v. Hall*, 1838, 4 Bing. N. C. 183 ; 7 L. J. (N. S.) C. P. 122.

(*i*) *R. v. Pierce*, 1683, 2 Show. 327.

(*k*) *Grindley v. Booth*, 1865, 3 H. & C. 669.

(*l*) Supra.

(*m*) *Reinhardt v. Mentasti*, 1889, 42 Ch. D. 685 ; 58 L. J. Ch. 787.

(*n*) *Crump v. Lambert*, 1867, 3 Eq. 409 ; *Sampson v. Smith*, 1838, 8 Sim. 272 ; 7 L. J. (N. S.) Ch. 260 ; *Smith v. Midland Co.*, 1877, 37 L. T. 224.

(*o*) Non putare se, ex tabernâ caseariâ fumum in superiora ædificia jure immitti posse, nisi ei rei servitutem talem admittit. Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet. In suo enim alii hactenus facere licet, quatenus nihil in alienum immittat ; fumi autem, sicut aquæ, esse immissionem ; posse igitur superiorem cum inferiore agere, "jus illi non esse id ita facere."—Dig. 8, 5, 8, § 5, si serv. vind.

Ergo per contrarium agi poterit, "jus esse fumum immittere." Sed et interdictum "uti possidetis" poterit locum habere, si quis prohibeatur, qualiter velit suo uti.—Ib.

Nam et in balineis (inquit) vaporibus cum Quintilla cuciculum pergentem in Ursi Julii instruxisset, placuit, potuisse tales servitudes imponi.—Ib. § 7.

(*p*) Apud Pomponium dubitatur an quis possit ita agere, "licere fumum non gravem, puta ex foco, in suo facere," aut "non licere." Et ait magis non posse agi : sicut agi non potest, "jus esse in suo ignem facere, aut sedere, aut lavare."—Ib. § 6.

A nuisance from noise and vibration is more difficult to prove than in the case of injury arising from a visible or tangible cause (*q*). But proceedings have been taken in respect of bell-ringing (*r*); noise from confectioner's mortar (*s*); noisy machinery (*t*); electric stations (*u*); rifle practice (*x*); loud music (*y*); a circus or organs (*z*); noisy crowds (*a*); building operations (*b*).

Noise and vibration.

As regards the establishment of a school, it is stated in Comyn's Digest (*c*), "If a man sets up a school so near my study who am of the profession of the law that the noise interrupts my studies, no action lies."

Proceedings have also been taken in respect of the disposal of sewage (*d*), or the pollution of water (*e*), or the diversion thereof (*f*).

Nuisances as regards water.

As regards hospitals a small-pox hospital is not necessarily a nuisance (*g*), nor is it an offensive business within s. 112 of the Public Health Act, 1875 (*h*).

Hospitals.

(*q*) *Gaunt v. Fynney*, 1872, 8 Ch. 11; 42 L. J. (N. S.) Ch. 122.

(*r*) *Soltan v. De Held*, 1852, 2 Sim. N. S. 133; 21 L. J. Ch. 153; 89 R. R. 245.

(*s*) *Sturges v. Bridgman*, 1879, 11 Ch. D. 852; 48 L. J. Ch. 785.

(*t*) *White v. Cohen*, 1852, 1 Drew. 312; 94 R. R. 669; *Eaden v. Firth*, 1863, 1 H. & M. 573; 136 R. R. 247; *Fenwick v. E. London Co.*, 1875, 20 Eq. 544; 44 L. J. (N. S.) Ch. 602; *Heather v. Pardon*, 1877, 37 L. T. 393; *Rushmer v. Polsue*, 1906, 1 Ch. 234; 1907, A. C. 121; 76 L. J. Ch. 365.

(*u*) *Shelfer v. City of London Co.*, 1895, 1 Ch. 287; 64 L. J. Ch. 216; *Cowell v. St. Pancras*, 1904, 1 Ch. 707; 73 L. J. Ch. 275. See *Knight v. Isle of Wight*, 1904, 90 L. T. 410; 73 L. J. Ch. 299.

(*x*) *Hawley v. Steele*, 1877, 6 Ch. D. 521; 46 L. J. Ch. 782.

(*y*) *Christie v. Darcy*, 1893, 1 Ch. 316; 62 L. J. Ch. 339.

(*z*) *Inchbald v. Robinson*, 1869, 4 Ch. 388; *Lambton v. Mellish*, 1894, 3 Ch. 163; 63 L. J. Ch. 929.

(*a*) *Bellamy v. Wells*, 1891, 60 L. J. Ch. 156; *Germaine v. London Exhibitions*, 1896, 75 L. T. 101; *Dewar v. City Racecourse*, 1899, 1 I. R. 345. See as to the obstruction of a highway by crowds, *Lyons v. Gulliver*, 1914, 1 Ch. 631; 83 L. J. Ch. 281; *Barber v. Penley*, 1893, 2 Ch. 447; 62 L. J. Ch. 623.

(*b*) *Lipman v. Pulman*, 1904, 91 L. T. 132.

(*c*) "Action on the Case for Nuisance, C." See *Harrison v. Good*, 1871,

11 Eq. 338; 40 L. J. (N. S.) Ch. 294, where a purchaser had covenanted not to do anything which should be a nuisance to adjoining occupiers, and Bacon, V.-C., held that the establishment of a National School, not being a nuisance at law, was not within the covenant. See, however, as to this decision, *Tod Heatley v. Benham*, 1888, 40 Ch. D. 95; 58 L. J. Ch. 83. The establishment of a school has been held a breach of other covenants in *Doe v. Keeling*, 1813, 1 M. & S. 95; 14 R. R. 405; *Kemp v. Sober*, 1851, 1 Sim. N. S. 517; 20 L. J. Ch. 602; 89 R. R. 169.

(*d*) *A.-G. v. Basingstoke*, 1876, 24 W. R. 817; 45 L. J. Ch. 726; *St. Helen's Co. v. St. Helen's*, 1876, 1 Ex. D. 196; 45 L. J. M. C. 150; *Glossop v. Heston Board*, 1879, 49 L. J. Ch. 89; 12 Ch. D. 102; 49 L. J. Ch. 89; *A.-G. v. Dorking*, 1882, 20 Ch. D. 595; 51 L. J. Ch. 585; *Charles v. Finchley*, 1883, 23 Ch. D. 767; 52 L. J. Ch. 554; *Ballard v. Tomlinson*, 1885, 29 Ch. D. 115; 54 L. J. Ch. 454; *Brown v. Dunstable*, 1899, 2 Ch. 378; 68 L. J. Ch. 498; *Gibbings v. Hungerford*, 1904, 1 I. R. 211.

(*e*) *Wood v. Waud*, 1849, 3 Exch. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Ballard v. Tomlinson*, 1885, 29 Ch. D. 115; 54 L. J. Ch. 454. See *Chase v. London C. C.*, 1898, 62 J. P. 184.

(*f*) *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 155; 51 L. J. Q. B. 348.

(*g*) *A.-G. v. Nottingham*, 1904, 1 Ch. 673; 73 L. J. Ch. 512; *A.-G. v. Manchester*, 1893, 2 Ch. 87; 62 L. J. Ch. 459

(*h*) For note (*h*) see p. 398.

Defences to actions for nuisance.

(1) The acts were done in a convenient place.

Doctrine of convenience.

To an action for a nuisance many defences have been raised. (1) It has been urged that the acts of the defendant were done "in a convenient and proper place" (i). And the following authority has been cited:—In *Com. Dig. (j)* it is said: "So it (an action) does not lie for a reasonable use of any right, though it be to the annoyance of another. As if a butcher, brewer, &c. use his trade in a convenient place, though it be to the annoyance of his neighbour" (k).

In *Bamford v. Turnley* (l), a brick-burning case, the Court held that *Hole v. Barlow* (4 C. B. N. S. 334) was not well decided, and that the words "convenient place," in the passage in *Com. Dig.*, meant a place where a nuisance would not be caused to another. And in *Cavey v. Ledbitter* (m) Wightman, J., refused to leave to the jury the question whether the place where the defendant burned the bricks was a convenient and proper place for the purpose, but left it to them to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable and whether his shrubs had been thereby injured. The Court held the judge's direction correct. Erle, C.J., said that the affairs of life in a dense neighbourhood could not be carried on without mutual sacrifices of comfort, and in all actions for discomfort the law must regard the principle of mutual adjustment; that the notion, that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, was as untenable as the

See *A.-G. v. Rathmines*, 1904, 1 I. R. 161; *Metropolitan Asylum v. Hill*, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353; *Fleet v. Metropolitan Asylums*, 1886, 2 T. L. R. 361; *Bendelow v. Wortley*, 1887, 4 T. L. R. 67; 57 L. J. Ch. 762.

(h) *Withington v. Manchester*, 1893, 2 Ch. 19; 62 L. J. Ch. 393.

(i) Per Byles, J., in *Hole v. Barlow*, 1858, 4 C. B. N. S. 334.

(j) Action upon the Case for a Nuisance (C.).

(k) The authority for the passage in *Com. Dig.* is probably 2 Rolle, Ab. 139, Nusans, F., pl. 2. "If a man makes candles in a vill, by which he causes a noisome smell to the inhabitants, still this is no nuisance, for the needfulness of them shall dispense with the noisomeness of the smell, 3 Jac. B. R. *Rankett's Case* adjudged" (Vin. Ab., Nusance, F., pl. 2). Hawkins questions the reasonableness of this opinion (P. C. bk. 1, c. 32, s. 10, vol. 1, 694, Curwood's ed.). Or Comyn may refer to *Anon.* (1 Vent.

26): "It was said that a man ought not to be punished for the erecting of anything necessary for his lawful trade, but it was answered that this ought to be in a convenient place where it may not be a nuisance. For Twisden said he had known of an injunction for erecting of a brewhouse near Serjeants' Inn; but the other justices doubted and agreed that it was unlawful only to erect such things near the King's palace."

The places where trade could be carried on in towns appear formerly to have been regulated by bye-law. See pl. 34, E. 15 Car.; *Playe v. Jenkins*, 1 Sid. 284; B. R. P. 18 Car. 2; Vin. Ab., Bye-laws, B., pl. 16; 1 Russell on Crimes, p. 440.

(l) 1860, 3 B. & S. 62; 31 L. J. Q. B. 286; 129 R. R. 235. See also *Beardmore v. Treadwell*, 1863, 3 Giff. 683; 33 L. J. Ex. 73; 133 R. R. 771; *A.-G. v. Birmingham*, 1858, 4 K. & J. 528; 116 R. R. 445.

(m) 1863, 13 C. B. N. S. 470; 32 L. J. C. P. 104; 134 R. R. 610.

notion that if the act complained of were done in a convenient time and place, it must therefore be justified, whatever the degree of annoyance that was occasioned thereby.

Defences to actions for nuisance.

In *Tipping v. St. Helen's Co.* (n), an action for a nuisance by noxious fumes, Mellor, J., directed the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless he has acquired a prescriptive right to do so; but that the law does not regard trifling inconveniences. Everything must be looked at from a reasonable point of view, and therefore, in an action of nuisance to property from noxious vapours, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining that question, time, locality, and all the circumstances must be taken into consideration. In places where great works had been erected and carried on, which were the means of developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in such places. The defendant complained of the direction, but the Courts of Queen's Bench and Exchequer Chamber held it to be correct; and Cockburn, C.J., said that it was not a right question to put to the jury to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing of it in that place was a reasonable use of the defendant's land, and that it was inconsistent with sound reason to say that the matter could be considered with reference to the interest of the public. Without compensation, an individual was not precluded from redress for private injury on account of a benefit to the public arising from that injury. The judgment was affirmed by the House of Lords (o).

It appears from the above authorities that it is no defence to an action in respect of a nuisance for the defendant to say that his acts were done in a convenient place.

(2) Again, it has been urged that the defendant is only making a reasonable use of his property. It is settled, however, that this is no sufficient defence. In *Broder v. Saillard* (p) the owner of a house near Regent's Park sued the defendant, who was the occupier of an adjoining house, for a nuisance alleged to arise from the noise of horses in the defendant's stable. The defendant contended that keeping horses was a reasonable way of using his property. And on

(2) The acts were a reasonable use of the defendant's property.

(n) 1863, 4 B. & S. 608.

(o) 11 H. L. C. 642; 35 L. J. Q. B. 66; 145 R. R. 348; *St. Helen's Co. v. Tipping*. See also the ruling of Black-

burn, J., in *Scott v. Firth*, 1864, 4 F. & F. 349; 142 R. R. 701.

(p) 1876, 2 Ch. D. 692, 701; 45 L. J. Ch. 414.

Defences to
actions for
nuisance.

this point Jessel, M.R., laid down the law as follows :—“ I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property. Because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted. Therefore I think that is not the test.”

Again, in *Reinhardt v. Mentasti* (q) the owner of a house in Piccadilly sued the owner of an adjoining hotel alleging that his own wine was spoiled by the defendant's stove. Kekewich, J., followed the above rule laid down in *Broder v. Saillard* and granted an injunction. In the course of his judgment he said : “ The application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own property reasonably or otherwise. The real question is, does he injure his neighbour ? I recognize some hardship in an injunction to restrain the defendants from doing that which I am obliged to regard as a reasonable use of their property, the better adapting to the purposes of an hotel a house situate in a neighbourhood where hotels are conveniently built.”

In discussing the above cases, however, it is necessary to consider carefully the meaning attached by the Court to the word “ reasonable.” Does it mean reasonable from the point of view of the defendant, or of his neighbour, or of the public ? Again, does the word imply what is usual and ordinary ? Thus, in *Reinhardt v. Mentasti* (r) the defendant's acts were “ reasonable ” from his point of view, but “ unreasonable ” from his neighbour's point of view. For the defendant was held to have committed a nuisance, and if he com-

(q) 1889, 42 Ch. D. 682 ; 58 L. J. Ch. 787. (r) *Supra*.

mitted a nuisance, he could not say (in the wide sense) that he was acting reasonably (s).

Defences to actions for nuisance.

Further, the word "reasonable" has sometimes been used as implying or including what is usual and ordinary. Thus, in *Bull v. Ray* (t) it is said by Lord Selborne: "If either party turns his house or any part of it to unusual purposes in such manner as to produce substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property." So in *Sanders Clarke v. Grosvenor Mansions* (u) it was said by Buckley, J.: "If the defendant is not using his property reasonably, if he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief."

(3) Again, it has been urged as a defence to an action for a nuisance that previously to the acts of the defendant similar nuisances existed in the particular locality. But this is no defence where it is shown that the defendant has materially added to the existing nuisances (x).

(3) Nuisances by others.

Thus, it is no answer to a claim for an injunction against a nuisance for fouling water that the water is already fouled by others, who have a right to do so. "The circumstance of the plaintiff buying up these rights (he had bought up some but not all) indicates the soundness of the rule of law which has been laid down in the House of Lords in the case of *St. Helen's Smelting Co. v. Tipping*, namely, that you cannot justify an additional nuisance in the case of smoke, if it can be clearly traced to your new chimney, on the ground that the plaintiff has had a great many nuisances to encounter before. If the nuisances which he has had to encounter before have been such that it is impossible to trace any evil to the work you are conducting with your new chimney, possibly the case may be otherwise; though even then it must be seen how unreasonable it would be to allow such an excuse, because the circumstance that a person who is so injured can buy up those who have acquired rights against him is no reason why he should be compelled to submit to your additional nuisance until he has bought up all the rest" (y).

On a similar principle it has been held that the acts of one person which, taken alone, would not amount to a nuisance, may constitute a nuisance when taken together with the acts of others (z).

(s) See *A.-G. v. Cole*, 1901, 1 Ch. 207; 70 L. J. Ch. 148.

(t) 1873, 8 Ch. 470.

(u) 1900, 2 Ch. 373.

(x) *Rushmer v. Polsue*, 1906, 1 Ch. 236; 76 L. J. Ch. 365.

(y) *Crossley v. Lightowler*, 1866, 3

Eq. 289, per Wood, V.-C.; 2 Ch. 478; 36 L. J. Ch. 584. See also *Crumph v. Lambert*, 1867, 3 Eq. 409; 17 L. T. 133.

(z) *Lambton v. Mellish*, 1894, 3 Ch. 163; 63 L. J. Ch. 929; *Thorpe v. Brumfitt*, 1873, 8 Ch. 650; *Blair v.*

Defences to actions for nuisance.

(4) Doctrine of "coming to a nuisance."

(4) Again, a defence has been based on the doctrine of "coming to a nuisance."

Some ancient authorities appear to have recognized a species of right to corrupt the air or disturb a natural right given by an enjoyment, however short, provided that at the commencement of it no person was in a situation to be injured by such corruption or disturbance; the party afterwards complaining, even though the nuisance was modern, was said to have come to the nuisance, and was held to have no right of action for any injury sustained.

The above doctrine was discussed in a number of old cases (a); but was condemned in *Elliotson v. Feetham* (b), a case of nuisance from noise. Again, in *Bliss v. Hall* (c) (nuisance from candle-making) the defendant pleaded he was possessed of his messuage before the plaintiff acquired his house; but the Court held the plea was no answer to the action. Tindal, C.J., said: "The defendant, in answer, says, that he was possessed of his messuages for the space of three years next before the plaintiff became possessed of his messuage, and that he had, during all that time, carried on the trade of a candle-maker there to the same extent and in the same manner as at the time complained of. That plea appears to me to afford no answer whatever in point of law to the charge in the declaration, which unquestionably is a nuisance. It may be that the defendant was the first occupier; but the plaintiff came to his house clothed with all the rights appurtenant to it, one of which at common law is a right to wholesome and untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law will presume a grant from his neighbours in favour of the party who causes it. *Elliotson v. Feetham* decided the point."

Now exploded.

In several recent cases this doctrine has been treated as exploded (d).

Deakin, 1887, 57 L. T. 522; *Harrison v. G. N. R.*, 1864, 3 H. & C. 231; 33 L. J. Ex. 266; 140 R. R. 410.

(a) *Leeds v. Shakerley*, 1600, Cro. Eliz. 751; *Moore v. Dame Browne*, 1572, Dyer, 319 b; *Tenant v. Goldwin*, 1705, 2 Ld. Raym. 1089; S. C. 1 Salk. 360; *Lawrence v. Obee*, 1814, 3 Camp. 514; 14 R. R. 830; Ric. de D., Assiz. Anno 4, pl. 3, p. 6; Fitzherbert, N. B., 124 H., p. 290; *Westbourne v. Mordant*, 1590, Cro. Eliz. 191; *Barwick v. Cunden Hill*, 1593, Cro. Eliz. 462; *Moore*, 599; *Rolf's Case*, 1738, 5 Rep. 101 a; *Penruddock's Case*, 1738, 5 Rep. 100 b; *Tome v.*

Barwick, 1610, Cro. Jac. 231; *Rosewell v. Prior*, 1699, 12 Mod. 635; 2 Salk. 460; 1 Ld. Raym. 392, 713; Vin. Ab., Nuisance, L., *Brewery Case*, Vin. Ab.; Nuisance, G., pl. 18.

(b) 1835, 2 Bing. N. C. 134; 42 R. R. 557.

(c) 1838, 4 Bing. N. C. 183; 7 L. J. (N. S.) C. P. 122; 44 R. R. 697.

(d) *London and Brighton Co. v. Truman*, 1885, 11 App. Cas. 52; 54 L. J. Ch. 849; *A.-G. v. Manchester*, 1893, 2 Ch. 95; 62 L. J. Ch. 459; *Tipping v. St. Helen's*, 1865, 1 Ch. 66; *Crump v. Lambert*, 1867, 3 Eq. 413.

It is settled, however, that many acts done upon a man's own property which are in their nature injurious to the adjoining land, and consequently actionable as private nuisances, may be legalized by prescription. Thus, the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but by an easement acquired by his neighbour a man may, it appears, be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades. Again, with regard to flowing water, the right not to have impure water discharged on a man's land is one of the ordinary rights of property, the infringement of which can only be justified by an easement previously acquired by the party so discharging it.

Legalization
of private
nuisances by
prescription.

Thus, it is said in Viner's Abridgment (*e*) that an ancient brew-house, though erected in Fleet Street or Cheapside, is not a nuisance. So, it seems that an ancient user may be a justification for the exercise of a noisy (*f*) or offensive trade (*g*), or for discharging water in an impure state upon the adjoining land (*h*), or for polluting a stream (*i*), or for discharging coal dust on a neighbour's wharf (*k*). In *Bliss v. Hall* (*g*), "twenty years' user," said Park, J., "would legalize the nuisance."

But until a nuisance arises, no one can complain. And therefore a right to carry on an offensive trade, or to pollute water with sewage, is not acquired merely by having carried on the trade or having drained into the water for twenty years; but it must be shown that the air over the plaintiff's land, or the water to which he is entitled, has been corrupted for that period (*l*), and corrupted

From what
period time
runs.

(*c*) Nuisance, G.

(*f*) *Elliotson v. Frotham*, 1835, 2 Bing. N. C. 134; 42 R. R. 557; *Crump v. Lambert*, 1867, 3 Eq. 413.

(*g*) *Bliss v. Hall*, 1838, 6 Scott, 500; 4 Bing. N. C. 183; 7 L. J. (N. S.) C. P. 122; 44 R. R. 697.

(*h*) *Wright v. Williams*, 1836, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Brown v. Dunstable*, 1899, 2 Ch. 378; 68 L. J. Ch. 498.

(*i*) *Carlyon v. Lovering*, 1857, 1 H. & N. 797; 26 L. J. Ex. 251; 108 R. R. 822; *Murgatroyd v. Robinson*, 1857, 7 E. & B. 391; 26 L. J. Q. B. 233; 110 R. R. 642; *Moore v. Webb*, 1857, 1 C. B. N. S. 673; 107 R. R. 854; *Stockport v. Potter*, 1861, 7 H. & N. 160; 31 L. J. Ex. 9; 126 R. R. 376; *Wood v.*

Sutcliffe, 1851, 2 Sim. N. S. 163; 21 L. J. Ch. 253; 89 R. R. 262; *Crossley v. Lightowler*, 1867, 2 Ch. 478; 36 L. J. Ch. 584; *Bazendale v. McMurray*, 1867, 2 Ch. 790. Dist. *A.-G. v. Luton*, 1856, 2 Jur. N. S. 180; 106 R. R. 929; *Harrington v. Derby*, 1905, 1 Ch. 205; 74 L. J. Ch. 219.

(*k*) *Royal Mail Co. v. George*, 1900, A. C. 480; 69 L. J. P. C. 107. See *Pwllbach v. Woodman*, 1915, A. C. 634.

(*l*) *Flight v. Thomas*, 1839, 10 A. & E. 590; 52 R. R. 468; *Murgatroyd v. Robinson*, 1857, 7 E. & B. 391; 26 L. J. Q. B. 233; 110 R. R. 642; *Goldsmid v. Tunbridge Wells*, 1866, 1 Ch. 349; 35 L. J. Ch. 88.

No prescrip-
tion for a
public
nuisance.

to the extent of the right claimed (*m*), and so as to be actionable or preventable by the plaintiff or his predecessors (*n*).

There can be no prescription to make a public nuisance, which is a prejudice to all people, because it cannot have a lawful beginning, by licence or otherwise, being against the common law (*o*). Thus a prescription for the inhabitants of a town to lay logs in a highway was held void (*p*); and so of a prescription to maintain in a navigable river a weir not erected before the time of Edward I. (*q*); similarly, a claim to a right to use a public footway for wheeled traffic after forty years' user for that purpose was held bad on the ground that the user was in its inception, and had been all along, a public nuisance (*r*).

On the same ground a prescription to discharge sewage into a river was held bad (*s*). As regards the right to discharge sewage into a tidal river or the sea, there is no such common law right (*t*). But it seems that an easement in gross of this nature might be acquired by the corporation of a town (on behalf of the inhabitants), the right being based on a lost grant from the Crown (*u*), or possibly on prescription at common law (*x*).

Where the nuisance is public only in the sense of being injurious to many proprietors, as is an offensive trade, the rule that there can be no prescription for a public nuisance does not apply. The owners of property affected by such trade may have licensed it, or have taken from the tradesman subject to his right to carry it on (*y*).

Legalization
of private
nuisance by
grant.

In *Lyttelton Co. v. Warners* (*z*) a nuisance from noise and vibration was legalized on the ground of an implied grant arising from the common intention of the parties. But where it was claimed that

(*m*) *Crossley v. Lightowler*, 1867, 2 Ch. 478; 36 L. J. Ch. 584; *Heather v. Pardon*, 1878, 37 L. T. 393. Cf. *Lemmon v. Webb*, 1894, 3 Ch. 1; 64 L. J. Ch. 205; on appeal, 1895, A. C. 1; and *Rushmer v. Polsue*, 1906, 1 Ch. 234; 1907, A. C. 121; 76 L. J. Ch. 365.

(*n*) *Sturges v. Bridgman*, 1879, 11 Ch. D. 852; 48 L. J. Ch. 785. Cf. *Fletcher v. Bealey*, 1885, 28 Ch. D. 688; 54 L. J. Ch. 424.

(*o*) See *Butterworth v. West Riding*, 1909, A. C. 57; 78 L. J. K. B. 207; *Mott v. Shoolbred*, 1875, 20 Eq. 24; 44 L. J. (N. S.) Ch. 380.

(*p*) *Fowler v. Sanders*, 1618, Cro. Jac. 446; *Dewell v. Sanders*, 1619, Cro. Jac. 490; 2 Rolle, Ab. 265; Vin. Ab., Prescription, F. Com. Dig., Prescription, F. 2.

(*q*) *Rolle v. Whyte*, 1868, L. R. 3 Q. B. 286; 37 L. J. Q. B. 105; *Leconfield v. Lonsdale*, 1870, L. R. 5 C. P. 657; 39 L. J. C. P. 305. Cf. *Traill v. McAllister*, 1891, 25 L. R. Ir. 524.

(*r*) *Sheringham v. Holsey*, 1904, 91 L. T. 225.

(*s*) *A.-G. v. Barnsley*, 1874, W. N. 37.

(*t*) *Foster v. Warblington*, 1906, 1 K. B. 665; 75 L. J. K. B. 514; *Hobart v. Southend*, 1906, 75 L. J. K. B. 305; compromised on appeal, 22 T. L. R. 530.

(*u*) *Somersetshire v. Bridgwater*, 1899, 81 L. T. 732.

(*x*) *Foster v. Warblington*, sup.

(*y*) *R. v. Neville*, 1792, Peake, 125 (91); 3 R. R. 662. Cf. *Harrop v. Hirst*, 1868, L. R. 4 Exch. 43; 38 L. J. Ex. 1.

(*z*) 1907, A. C. 476; 76 L. J. P. C. 106.

a lease which authorized a trade conferred an implied right in carrying on the trade in a reasonable manner to commit a nuisance, it was held by the House of Lords that the grant of the right to carry on the trade did not authorize a nuisance, in the absence of proof that the trade could not be carried on otherwise (a).

(a) *Pwellbach v. Woodman*, 1915, A. C. 634.

CHAPTER VIII.

PARTY-WALLS, BANKS, FENCES, AND BOUNDARY TREES AND BUILDINGS.

I. *Party-walls.*

ALTHOUGH, strictly speaking, the rights and liabilities in respect of a party-wall relate principally to the doctrine of tenancy in common, yet some of the rights partake of the character of easements.

Meaning of
party-wall.

The term “ party-wall ” may mean—(1) a wall of which the two adjoining owners are tenants in common ; or (2) a wall divided longitudinally into two portions, one belonging to each adjoining owner ; or (3) a wall which belongs entirely to one adjoining owner but subject to an easement in the other to have it maintained as a dividing wall ; or (4) a wall divided longitudinally into two portions, each portion being subject to a cross easement in favour of the owner of the other (*a*).

Party-wall
ownership.
Tenancy in
common.

The primary meaning of “ party-wall ” is a wall of which the two adjoining owners are tenants in common (*b*). Such owners are *primâ facie* tenants in common where there has been common user of the wall (*c*). And the same conclusion may result where it is not known under what circumstances the wall was built (*d*). But where the quantity of land which each adjoining owner contributed to the site of the wall is known, the property in the wall follows the property in the land and each party is the owner of so much of the wall as stands upon his own land (*e*).

Owners in
severalty.

Rights of
owners in
severalty.

In the latter case of several ownership there seems no authority for saying that the rights of the respective owners of the portions of the wall differ from those of the proprietors of any other two walls which abut on each other. Unless prevented by some easement having been acquired, either party would be at liberty to pare away or even

(*a*) *Watson v. Gray*, 1880, 14 Ch. D. 194 ; 49 L. J. Ch. 243.

(*b*) *Ibid.*

(*c*) *Cubitt v. Porter*, 1828, 8 B. & C. 257 ; 6 L. J. K. B. 306 ; *Standard Bank v. Stokes*, 1878, 9 Ch. D. 71 ; 47 L. J. Ch. 554.

(*d*) *Wiltshire v. Sidford*, 1827, 1

Man. & Ry. 404 ; 6 L. J. K. B. 151.

(*e*) *Matts v. Hawkins*, 1813, 5 Taunt. 20 ; 14 R. R. 695. See *Murly v. McDermott*, 1838, 8 A. & E. 138 ; 7 L. J. (N. S.) Q. B. 242 ; 47 R. R. 523 ; *Irving v. Turnbull*, 1900, 2 Q. B. 129 ; 69 L. J. Q. B. 593.

entirely to remove his portion, notwithstanding the other half might be unable to stand without the support of it (*f*). At the utmost, the fact of the close union of the walls could only impose a duty of greater caution than might otherwise be required in removing the materials. "If," said Bayley, J., "the wall stood partly on one man's land and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two" (*g*). Reasonable care should be used in removing any portion of the wall (*h*). And trespass will lie if one adjoining owner in rebuilding goes beyond his own boundary (*i*).

Where a party-wall belongs to two adjoining owners as tenants in common, either owner can have partition (*j*). While, however, the tenancy in common exists, one owner can sue the other in trespass where there has been actual expulsion by the defendant (*k*), or acts by him which amount to actual ouster (*l*). But where an old party-wall is destroyed merely for the purpose of rebuilding another on its site as speedily as possible, an action of trespass will not lie (*m*). Where one owner has excluded the other from the use of the top of the party-wall by placing an obstruction thereon, the only remedy of the excluded owner is to remove the obstruction (*n*). Each owner of a party-wall has the right to repair it (*o*), but he has no right of contribution from the other owner for moneys spent in ordinary repairs (*p*). There is no fiduciary relation between tenants in common of real estate (*q*).

As regards easements over a party-wall it is settled that where a landowner erects on his land several adjoining houses, necessarily requiring mutual support, and sells one of the houses retaining the

(*f*) *Wigford v. Gill*, 1592, Cro. Eliz. 269; *Pryton v. London*, 1829, 9 B. & C. 725; 7 L. J. K. B. 232.

(*g*) *Cubitt v. Porter*, 1828, 8 B. & C. 264; 6 L. J. K. B. 306; 32 R. R. 374. See on this point *Bradbee v. Christ's Hospital*, 1842, judgment of Tindal, C.J., 4 Man. & G. 761.

(*h*) *Kempston v. Butler*, 1861, 12 Ir. C. L. R. 516; *Southwark Co. v. Wandsworth*, 1898, 2 Ch. 612; 67 L. J. Ch. 657. See *Hughes v. Percival*, 1883, 8 App. Cas. 443; 52 L. J. Q. B. 719.

(*i*) *Mayfair Co. v. Johnston*, 1894, 1 Ch. 508; 63 L. J. Ch. 399.

(*j*) *Mayfair Co. v. Johnston*, 1894, 1 Ch. 508; 63 L. J. Ch. 399. See *Turner v. Morgan*, 1803, 8 Ves. 143.

(*k*) *Murray v. Hall*, 1849, 7 C. B.

441; 18 L. J. C. P. 161; 78 R. R. 708. See *Jacobs v. Seward*, 1872, L. R. 5 H. L. 464; 41 L. J. (N. S.) C. P. 221.

(*l*) *Stedman v. Smith*, 1857, 8 E. & B. 1; 26 L. J. Q. B. 314; 112 R. R. 446.

(*m*) *Standard Bank v. Stokes*, 1878, 9 Ch. D. 72; 47 L. J. Ch. 554. See *Jones v. Read*, 1876, 1 R. 10 C. L. R. 315.

(*n*) *Watson v. Gray*, 1880, 14 Ch. D. 192; 49 L. J. Ch. 243.

(*o*) *Coldbeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234; 45 L. J. Q. B. 225. Compare the civil law, Digest, 8, 2, 8, 19, 20.

(*p*) *Leigh v. Dickson*, 1884, 15 Q. B. D. 60; 54 L. J. Q. B. 18.

(*q*) *Kennedy v. De Trafford*, 1897, A. C. 80; 66 L. J. Ch. 113.

Party-walls.

Rights of tenants in common of party-wall.

Easements over a party-wall.

Party-walls. other, there as against himself he grants the right of support, and on his own part also reserves the right (*r*) Again, where a man grants a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between his own house and an adjoining one to be built by the grantee, the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case. Subject, however, to the easements of which the grant or reservation will be so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may respectively deal with such moieties in such manner as they please (*s*).

Repair (where easement exists) of party-wall. With respect to the repair of a party-wall over which an easement exists, it has been laid down that where one adjoining owner possesses an easement over the half of the party-wall belonging to the other adjoining owner, and such half by reason of decay or otherwise passes into such a condition that the easement becomes impossible or difficult of exercise, there (apart from any special local custom or express contract) the servient owner is not liable to repair, but each party is entitled to repair the other's half of the wall so far as reasonably necessary for the enjoyment of any easement impliedly granted or reserved (*t*).

A wall may be a party-wall up to a certain point, namely, so far as it divides two buildings of unequal height, and an external wall above that point (*u*); and a pilaster or portico, or a fascia, which appears to form an integral portion of one house, may be parcel of and pass on a conveyance of another house (*v*).

London Building Act. In the metropolis party-walls are regulated by the provisions of the London Building Act, 1894 (*x*).

(*r*) *Richards v. Rose*, 1853, 9 Ex. 221; 23 L. J. Ex. 3; 96 R. R. 675. See *Howarth v. Armstrong*, 1897, 77 L. T. 62.

(*s*) *Jones v. Pritchard*, 1908, 1 Ch. 636; 77 L. J. Ch. 405.

(*t*) *Jones v. Pritchard*, 1908, 1 Ch. 637, 638; 77 L. J. Ch. 405.

(*u*) *Weston v. Arnold*, 1873, 8 Ch. 1084; 43 L. J. (N. S.) Ch. 123; *Drury v. Army and Navy Auxiliary*, 1896, 2 Q. B. 271; 65 L. J. M. C. 169; *Carlisle Café Co. v. Muse*, 1897, 46 W. R. 107; 65 L. J. Ch. 63. Cf. *Johnston v. Mayfair*, 1893, W. N. 73;

63 L. J. Ch. 399.

(*v*) *Thrupp v. Scrutton*, 1872, W. N. 60; *Fox v. Clarke*, 1874, L. R. 9 Q. B. 565; 43 L. J. (N. S.) Q. B. 178; *Francis v. Hayward*, 1882, 22 Ch. D. 177; 52 L. J. Ch. 291. Cf. *Reilly v. Booth*, 1890, 44 Ch. D. 12; *Laybourn v. Gridley*, 1892, 2 Ch. 53; 61 L. J. Ch. 352.

(*x*) 56 & 57 Viet. c. cexiii., Pt. VIII. See *Pratt v. Hillman*, 1825, 4 B. & C. 269; 3 L. J. K. B. 253; *Wheeler v. Gray*, 1859, 6 C. B. N. S. 606; 28 L. J. C. P. 200; 120 R. R. 290; *Major v. Park Lane Co.*, 1866, 2 Eq. 453; *Crofts*

II. *Banks.*

In the case of banks, &c., separating fields, the ownership is thus determined:—If two fields are separated by a ditch and bank, the bank and ditch, *primâ facie* and in the absence of proof to the contrary (*y*), are presumed to belong to the owner of the field immediately adjoining the bank; but if there be a bank with ditches at each side of it, then there is no presumption as to the ownership of the bank, and the question must be determined by acts of ownership (*z*).

Banks
separating
fields.

The above-mentioned presumption will not be rebutted by acts of ownership done by another without the knowledge of the owner (*a*). Where there is no presumption and the title turns on acts of ownership, it has been laid down that to acquire a title to the ditch the neighbour must take actual possession, e.g., by cultivating or building or paving or doing something for which an action of trespass or ejectment could reasonably be maintained (*b*).

III. *Fences.*

The only general obligation with respect to fences imposed by the common law is, that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours (*c*).

Obligation to
keep in
cattle.

There may, however, be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only suffi-

Spurious
easement, to
compel
repair of
fences.

v. *Haldane*, 1867, L. R. 2 Q. B. 194; 36 L. J. Q. B. 85; *Standard Bank v. Stokes*, ubi sup.; *Knight v. Pursell*, 1879, 11 Ch. D. 412; 49 L. J. Ch. 120; *Fillingham v. Wood*, 1891, 1 Ch. 51; 60 L. J. Ch. 232; *Crow v. Redhouse*, 1895, 59 J. P. 663; *Deury v. Army and Navy Auxiliary*, 1896, 2 Q. B. 271; 65 L. J. M. C. 169; *List v. Tharp*, 1897, 1 Ch. 260; 66 L. J. Ch. 175; *Hobbs v. Grover*, 1899, 1 Ch. 11; 68 L. J. Ch. 84; *In re Stone and Hastie*, 1903, 2 K. B. 463; 72 L. J. K. B. 846; *Orf v. Payton*, 1905, 21 T. L. R. 90; 69 J. P. 103; *Lewis v. Charing Cross*, 1906, 1 Ch. 508; 75 L. J. Ch. 282; *Crosby v. Alhambra*, 1907, 1 Ch. 295; 76 L. J. Ch. 176.

(*y*) *Marshall v. Taylor*, 1895, 1 Ch. 641; 64 L. J. Ch. 216; *Craven v. Pridmore*, 1902, 18 T. L. R. 282; *Henniker v. Howard*, 1904, 90 L. T. 157; *Simcox v. Yardley*, 1905, 69 J. P. 66.

(*z*) *Bayley, J.*, in *Guy v. West*, cited

in 2 Selwyn, N. P. 1297, 12th ed. See the explanation of this given by Lawrence, J., in *Vowles v. Mellor*, 1810, 3 Taunt. 137–8, and by Holroyd, J., in *Doe d. Pring v. Pearsey*, 1827, 7 B. & C. 307; 7 L. J. K. B. 310; 31 R. R. 209.

(*a*) *Craven v. Pridmore*, sup.; *Henniker v. Howard*, sup.

(*b*) *Kynock v. Rowlands*, 1912, 1 Ch. 531; 81 L. J. Ch. 340. See further, as to acts of ownership of a ditch, *Searby v. Tottenham*, 1868, 5 Eq. 409; *Norton v. L. & N. W. R.*, 1879, 13 Ch. D. 268; *Marshall v. Taylor*, sup.

(*c*) *Dyer*, 372 b; 1 Wms. Saund. 559; *Hilton v. Ankesson*, 1872, 27 L. T. N. S. 519. Cf. *Erskine v. Adeane*, 1873, 8 Ch. 756; 42 L. J. (N. S.) Ch. 835; and see the Year Book, 20 Edw. 4, 10, as to duty of commoners. As to the duty of a copyhold tenant to keep his boundaries distinct, see *Searle v. Cooke*, 1889, 43 Ch. D. 519; 59 L. J. Ch. 259.

Fences.
Spurious
easement, to
compel
repair.

ciently to restrain his own cattle within bounds, but also those of his neighbours (*d*), and rendering him liable for any injury which his neighbour's cattle may sustain in consequence of the non-repair of the fences,—which, unless an easement had been acquired by the neighbour, he clearly would not be. This liability is confined to the cattle of his neighbour, or such as are rightfully on the adjoining land, and does not extend to all cattle whatsoever, though they may have entered through the land of the party towards whom this obligation to keep the fences in repair legally exists (*e*). “If the cattle of one man escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers on the close from whence they come”: per Heath, J., in *Dovaston v. Payne* (*f*).

Anon.,
1 Vent.

In an anonymous case reported in Ventris (*g*) a plaintiff who declared that the defendants were bound to maintain a certain fence, and that, by reason of their neglect to do so, his mare escaped through the fence, and was drowned, was held entitled to recover.

Rooth v.
Wilson.

In *Rooth v. Wilson* (*h*), where a person to whom a horse had been sent turned it into a pasture, and by the defect of the fence, which the neighbouring owner was bound to repair, it fell down into the neighbouring close and was killed, the liability of the defendant for the consequences of his neglect in not repairing was not disputed, the only point made being that the bailee could not maintain the action (*i*).

(*d*) Per Bayley, J., in *Boyle v. Tamlyn*, 1827, 6 B. & C. 337-39; 5 L. J. K. B. 134; 30 R. R. 343; *Star v. Rookesby*, 1711, 1 Salk. 335; *Lawrence v. Jenkins*, 1873, L. R. 8 Q. B. 274; 42 L. J. (N. S.) Q. B. 147.

(*e*) See the judgment of Parsons, C.J., in *Rust v. Low*, 6 Mass. 90, in which the same view of the law is taken, and the whole question and the authorities upon it examined and explained.

The like rule applies in the case of the liability to maintain fences thrown upon railway companies by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68 (*Ricketts v. East and West India Co.*, 1852, 12 C. B. 160; 21 L. J. C. P. 201; 92 R. R. 663; *Manchester R. Co. v. Wallis*, 1854, 14 C. B. 213; 23 L. J. C. P. 85; 98 R. R. 590). See also, as to this liability, *Bessant v. G. W. R.*, 1860, 8 C. B. N. S. 368; 125 R. R. 687; *Marfell v. South Wales R.*, 1860, 8 C. B. N. S. 525; 29 L. J. C. P. 365; 125 R. R. 766; *Buxton v. N. E. R.*, 1868, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; *Dawson v. M. R.*,

1872, L. R. 8 Exch. 8; 42 L. J. (N. S.) Ex. 49; *Child v. Hearn*, 1874, L. R. 9 Exch. 176; 43 L. J. (N. S.) Ex. 100; *Wiseman v. Booker*, 1878, 3 C. P. D. 184; *Corry v. G. W. R.*, 1881, 7 Q. B. D. 322; 50 L. J. Q. B. 386; *Dixon v. G. W. R.*, 1897, 1 Q. B. 300; 66 L. J. Q. B. 132.

In some cases, as in *Fawcett v. York Co.*, 1851, 16 Q. B. 610; 20 L. J. Q. B. 222; 83 R. R. 630, particular statutes impose on railway companies a duty of keeping parts of the line guarded against all persons and cattle on the adjacent land, whether lawfully there or not; but the general liability is as above stated.

(*f*) 1795, 2 H. Bl. 527; 3 R. R. 497, preface, v.; vide etiam per Wilmot, C.J., 3 Wilson, 126.

(*g*) Vol. 1, p. 264.

(*h*) 1817, 1 B. & Ald. 59; 18 R. R. 431.

(*i*) See also *Powell v. Salisbury*, 1828, 2 Y. & J. 391; 31 R. R. 607; *Lee v. Riley*, 1865, 18 C. B. N. S. 722; 3 L. J. C. P. 212; 144 R. R. 644.

In *Singleton v. Williamson* (j) a man had distrained, damage
 feasant, cattle which had escaped from a close through defect of a
 fence which he himself ought to have repaired, and had ultimately
 strayed into his close, and the Court held that he was wrong, the
 trespass being the natural consequence of his own neglect of duty.

Fences.
 Spurious
 easement, to
 compel
 repair.
Singleton v.
Williamson.

The fact of the tenants of land enclosed by a fence always having
 repaired it is some evidence of an obligation to do so; and the
 evidence of obligation is strengthened if the land was originally
 enclosed from a common. When the privilege of inclosure was
 granted by the lord, it is unlikely that he would impose on the rest
 of his commoners the obligation of building and maintaining a fence,
 or that he would himself undertake the duty of doing so; and to
 take such a concession without imposing such a duty on the party
 benefited would be an injustice to the commoners (k).

The obligation is absolute, to maintain at all times a sufficient
 fence without notice to repair, except in the case of damage by the
 act of God or vis major. If the fence is broken by a stranger, and
 the servient owner has no notice of it, he is answerable for damage to
 cattle escaping into the dominant close and proximately due to that
 cause (l). The obligation, however, is to maintain such a fence as
 will keep out ordinary cattle, not cattle (e.g., sheep) possessed of an
 extraordinary power of jumping (m).

The remedy in these cases appears to be against the occupier of the
 land (n). Unity of possession would of course have the same effect
 in this as in the case of a regular easement (o); and if a man bound to
 repair as against his neighbour were to take a lease of the latter's
 close and then to sublet it, the sublessee would have no remedy
 against his landlord for not repairing.

As regards the Prescription Act, 1832, it has been laid down that
 the 2nd section includes easements of every description (p), and
 the obligation to maintain fences has been described as a "spurious"
 easement (q). If, however, this obligation can be regarded as a
 mere duty, it seems that the Act would not apply (r).

In connection with the above spurious easement obliging a land-
 owner to keep his fences in repair, reference should be made to the

Remedy.

(j) 1861, 7 H. & N. 410; 31 L. J. Ex.
 17; 126 R. R. 488.

(k) *Barber v. Whitely*, 1865, 11 Jur.
 N. S. 822; 34 L. J. Q. B. 212.

(l) *Lawrence v. Jenkins*, 1873, L. R.
 8 Q. B. 274; 42 L. J. (N. S.) Q. B. 147.

(m) *Coaker v. Wilcocks*, 1911, 2 K. B.
 124; 80 L. J. K. B. 1026.

(n) *Cheetham v. Hampson*, 1791, 4

T. R. 318; 2 R. R. 397; 1 Wms.
 Saund. 559.

(o) Above, p. 14.

(p) *Simpson v. Godmanchester*, 1897,
 A. C. 709; 66 L. J. Ch. 770.

(q) *Lawrence v. Jenkins*, 1873, L. R.
 8 Q. B. 279; 42 L. J. (N. S.) Q. B. 147.

(r) *Peter v. Daniel*, 1848, 5 C. B.
 573.

Fences.
Spurious
easement, to
compel
repair.

Statutory
liability
to fence.

Turnpike
trustees.

Inclosure Act.
Railway
companies.

Liability for
driving or
enticing
animals.

Townsend v.
Wathen.

Liability for
damage to
persons or
cattle
trespassing.

decisions imposing upon the owners of land fronting the sea an obligation to maintain a sea wall for the protection of an adjoining owner (see post, p. 431).

The trustees of a turnpike road are not bound to fence a road made by them, unless there is a special provision in their Act to that effect, although they have made fences and kept them in repair for many years (s). But if their Act directs fences to be made and repaired, they are the parties to make and repair, unless the burden is expressly imposed on some one else (t). The General Inclosure Act, 1845, also contains regulations as to fencing (u). And railway companies are under a statutory liability to maintain fences between the railway and the adjoining land (x). There is a common law obligation on the possessor of a quarry adjoining a highway to keep it fenced (y).

Analogous to this liability arising from neglect to do what the party was bound to do is that incurred by a party doing some positive act, as driving or enticing into his property the animals of his neighbours, so that they sustain injury thereby.

Thus in *Townsend v. Wathen* (z), where the defendant set traps baited with strong-smelling flesh so near the edge of his property as thereby to entice the plaintiff's dogs in the neighbouring close, which were caught in the traps and wounded, it was held that the defendant was liable. Lord Ellenborough said: "Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct, which he cannot resist, and putting him there by manual force?"

Where, however, no such obligation to repair exists, it seems,

(s) *R. v. Llandilo*, 1788, 2 D. & E. 232; 1 R. R. 466.

(t) *Merivale v. Exeter*, 1868, L. R. 3 Q. B. 149; 37 L. J. M. C. 40.

(u) Sect. 8.

(x) See ante, p. 410, note (c).

(y) *A.-G. v. Roe*, 1915, 1 Ch. 235; 84 L. J. Ch. 322.

(z) 1808, 9 East. 277; 9 R. R. 553.

though there are authorities throwing doubt on the point, that the owner of the land is not liable for injury sustained by cattle which are trespassing upon his property.

"If A., seised of a waste adjoining a highway, dig a pit in the waste within thirty-six feet of the said way, and the mare of B. escape into the said waste, and fall into the said pit, and there die, still B. shall not have any action against A., for that the making of the pit in the waste and not in the highway, was not any tort to B., but that it was by the default of B. himself that his mare escaped into the waste" (a).

So, in *Sarch v. Blackburn* (b), an action was brought "for knowingly keeping a ferocious dog accustomed to bite mankind, and which bit the plaintiff." The plaintiff was a watchman of the parish, and was bitten as he was going in the middle of the day to the defendant's house by a back way, which the defendant contended was a private way for himself and family only.

The plaintiff was alone at the time, and there was no evidence of the reason of his being in the place where he was bitten. There was a notice, "Beware of the dog," but the plaintiff could not read.

Tindal, C.J., left it to the jury to say on which side there was negligence. "If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover; if the defendant placed the dog where he might injure persons, not themselves in fault, he is responsible.

"The plaintiff certainly is not entitled to recover in this action, if he was injured by his own fault. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was

Fences
Liability for
damage to
persons or
cattle
trespassing.

Sarch v.
Blackburn.

(a) *Blyth v. Topham*, 1608, 1 Rolle, Ab. 88, Action on Case, N., Nusans, pl. 4; S. C., Cro. Jac. 158; see also *Brock v. Copeland*, 1794, 1 Esp. 203; 5 R. R. 730. In accordance with the principle of this case is *Hardcastle v. South Yorkshire R.*, above, p. 392; and it is also recognized in *Barnes v. Ward*, above, p. 392, which shows that where the excavation immediately adjoins the footway, so as to amount to a nuisance, the owner would be liable; and in *Hounsell v. Smyth*, 1860, 7 C. B. N. S. 731; 29 L. J. C. P. 203; 125 R. R. 698, where it was held that the owner of unenclosed land, over which the public are permitted by him to ramble without interference, is not bound to fence ex-

cavations in it, as every one using land under such circumstances must take the permission with its concomitant perils. It would be otherwise, however, in case of a man holding out any direct inducement or invitation to another to go by a path across his land; for in such a case he would be bound either to warn or guard the other against dangerous obstructions or pitfalls placed or continued by him in the path. See also the Highway Act (5 & 6 Will. 4, c. 50), s. 70, as to excavations near highways within the Act; and *Matson v. Baird*, 1878, 26 W. R. 835.

(b) 1830, Mood. & M. 505; 4 C. & P. 297; 34 R. R. 805.

Fences.
Liability for
damage to
persons or
cattle
trespassing.

Sarch v.
Blackburn.

on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the defendant's having put up the notice relied on would deprive him of his remedy. The mere putting up the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognizant of its contents. The plaintiff could not read; the notice, therefore, furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprise him of the danger. If, therefore, he had a right to be where he was, I see no fault or negligence in him to deprive him of his remedy. Still the defendant will not be liable unless he is in fault; unless he knows the character of the dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not, I think, in this case excuse him. But it is said, that he has a right to keep a fierce dog to protect his property. He certainly has so; but not, in my opinion, to place it on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ignorant of the notice, and going for a lawful purpose to the house by a way which he was entitled to use, I think the defendant would not be protected from this action."

Jordin v.
Crump.

In *Jordin v. Crump* (c) it was held that a man might lawfully place dog-spears on his own land, having a public footpath running across it, and that he would not be liable for damage inflicted by them on dogs deviating from the footpath, though they belonged to persons lawfully using the path. "Now in the present case," said Alderson, B., in delivering the judgment of the Court, "the injurious act was done by the dog to the land of the defendant; and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against that danger. If he chose to walk with his dog along a footpath through ground on which a dog might commit a trespass, he knew the risk he was running; and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case, the party digging the pit would be responsible for the injury, if the pit were dug across the road; but if it were only in an adjacent field the case would be very different,

(c) 1841, 8 M. & W. 782; 11 L. J. Ex. 74; 90 R. R. 929. The plaintiff had been given notice of the existence of

the dog-spears, but the Court said that made no difference.

for the falling into it would then be the act of the injured party himself" (*d*). The Court then cite and recognize the case above given of *Blyth v. Topham* (*e*), and say, "That case, therefore, is an authority that the fact of a trespass being involuntary makes no difference in this respect."

The cases, some of which appear at first sight to be in opposition to this doctrine (*f*), are instances in which a party has resorted to the use of some dangerous engine or ferocious animal for the preservation of his property, and has thus done indirectly what the law would not allow him to do by his own hand, unless it were absolutely necessary to preserve his property from immediate injury (*g*). These decisions are at the best very doubtfully expressed; they appear to be overruled to some extent by the above case of *Jordin v. Crump*; and it is decided at all events that if the party injured had express notice, and nevertheless persisted in committing the trespass, he can obtain no redress, but must take the consequences of his own act (*h*).

These cases must be distinguished from cases of "escape," whether of water (*i*), soil (*k*), or dangerous or poisonous substances (*l*).

Fences.
Liability for damage to persons or cattle trespassing
Jordin v. Crump.
Damage by ferocious animals to trespassers.

Escape.

IV. *Boundary Trees and Buildings.*

As regards boundary trees, there appears to be no authority in the English law that, in the absence of express stipulation, an easement can be acquired by user to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment and the perpetual change in the quantity of inconvenience imposed by it. Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching in the same manner that he may the overhanging branches (*m*).

Boundary trees.
Easement for roots.

Ownership of boundary trees.

(*d*) See *Barnes v. Ward*; *Hardcastle v. South Yorkshire Co.*; *Hounsell v. Smyth*, ante, p. 392.

(*e*) 1 Rolle, Ab. 88.

(*f*) *Deane v. Clayton*, 1817, 7 Taunt. 489; 18 R. R. 553; *Bird v. Holbrook*, 1820, 4 Bing. 628; 6 L. J. C. P. 146; 29 R. R. 657, preface, ix.

(*g*) *Vere v. Lord Cawdor*, 1809, 11 East, 568; 11 R. R. 268, preface, viii.; *Janson v. Brown*, 1807, 1 Camp. 41; 10 R. R. 626; *Corner v. Champneys*, 1814,

cited 2 Marshall, 584.

(*h*) *Holt v. Wilkes*, 1820, 3 B. & Ald. 304; 22 R. R. 400, preface, vii.

(*i*) *Rylands v. Fletcher*, 1863, L. R. 4 H. L. 330.

(*k*) *Hurdman v. N. E. R.*, 1878, 3 C. P. D. 168; 47 L. J. C. P. 368.

(*l*) *Firth v. Bowling Iron Co.*, 1878, 3 C. P. D. 254; 47 L. J. C. P. 358.

(*m*) 1 Rolle, Rep. 394; *Norris v. Baker*, 1613, per Croke, J.

Boundary
trees.

*Masters v.
Pollie.*

upon the question of property in trees growing upon the limits of two adjoining heritages than upon the question of easement.

Masters v. Pollie (*n*) was an action "of trespass quare clausum fregit, et asportavit the plaintiff's boards." The defendant justified "That there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree extended into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, and carried it into his own close and sawed it into boards, and the defendant entered and took and carried away some of the boards, prout ei benè licuit." The plaintiff demurred to this plea, and it was contended that the plea was bad, for although some of the roots of the tree are in the defendant's soil, yet the body (le corps del maine parte) of the tree being in the plaintiff's soil, therefore all the residue of the tree belongeth to him likewise. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise, quod curia concessit; but Mountague, C.J., said "That the plaintiff cannot limit the roots of the tree, how far they shall go."

In an anonymous case reported in the same volume, it is said (*o*): "If a tree grow in a hedge which divides the land of A. and B., and by its roots take nourishment in the land of A. and also of B., they are tenants in common of the tree; and so it was adjudged."

*Waterman v.
Soper.*

In *Waterman v. Soper* (*p*) "it was ruled by Holt, C.J., at Lent Assizes, at Winchester, upon a trial at Nisi Prius, 1697-8: 1st, That if A. plant a tree upon the extremest limits of his land, and the tree growing extend its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2nd, Two tenants in common of a tree, and one cuts the whole tree—though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons."

*Holder v.
Coates.*

In *Holder v. Coates* (*q*) an action of trespass was brought for cutting a tree of the plaintiff. The body of the tree stood in the defendant's land, but some of the lateral roots grew into the land of both parties. The evidence as to the position of the principal root was conflicting.

Littledale, J., referred to the case first above cited from Rolle's

(*n*) 1620, 2 Rolle, Rep. 141.

(*o*) P. 255.

(*p*) 1697, 1 Ld. Raym. 737.

(*q*) 1827, Mood. & M. 112; 31

R. R. 724.

Reports, and expressed his preference for the law as there laid down to the ruling of Lord Holt in *Waterman v. Soper* (r). The learned judge, in summing up, told the jury that he did not see on what grounds they could find for either party, as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant respectively; "but that the safest criterion for them would be to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil and of the roots within it, they could ascertain where the tree was first sown or planted." Upon the jury saying that they could not tell in whose ground the tree first grew, a verdict was taken by consent.

Boundary trees.

In *Hetherington v. Galt* (s) it was held by the Court of Session in Scotland that trees whose stems are wholly on one side of the boundary of two adjoining properties, but which stand so near the boundary as to extend their roots into the other side of it, are not the common property of both proprietors.

Hetherington v. Galt.

By the civil law, the neighbour into whose land the roots of a tree penetrated was not permitted to cut them off, although he might institute a suit to contest the right.

Civil law.

With regard to the property in a tree, the roots of which extended into two heritages, it would appear that if it derived its nourishment equally from both it became common property. If it drew its nourishment substantially from one heritage only, on whichever side it was originally planted, the property passed to the owner of the land supplying the nourishment (t).

Pothier, in his commentary on this passage of the Digest, that "the tree remains the property of him in whose soil it had its origin," says: "This is so, notwithstanding it is said in the Institutes, that the tree shall be considered his into whose soil the roots are protruded; for this is to be understood of such a protrusion of the roots as to draw all the nourishment for the tree from the neighbouring soil; but if my tree pushes the extremities of its roots only into my neighbour's soil, though it may by that means draw some nourishment therefrom, nevertheless the tree remains mine, because the tree has got its origin and the greater part of the roots in my soil."

(r) 1697, 1 Ld. Raym. 737.

(s) 1905, 7 F. 706.

(t) Si arbor in vicini fundum radices porrexit, recidere eas vicino non licebit; agere autem licebit, non esse ejus, sicuti tignum, aut protectum, immissum habere. Si radicibus vicini arbor aletur, tamen ejus est, in ejus fundo origo ejus fuerit.—Dig. 47, 7, 6, § 2, arb. furt. cæs.

Si vicini arborem ita terrâ presserim,

ut in meum fundum radices egerit, meam effici arborem. Rationem enim non permittere, ut alterius arbor intelligatur, quam ejus fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est.—Dig. 41, 1, 7, § 13, de adq. rer. dom.

Inst. 2, 1, 31, is identical in expression with the latter authority.

Boundary trees.

The civil law appears to agree with the rule as laid down in the anonymous case in Rolle, and in *Waterman v. Soper*, and, consequently, to be at variance with the opinion of Littledale, J.

The French Code contains many minute provisions upon this subject (*u*).

Overhanging trees.

With regard to trees on A.'s land but standing so near his boundary that the branches overhang B.'s adjoining land, it is settled that an encroachment by this means is a nuisance which may be abated by B. (*x*). If the overhanging branches are not in fact doing damage it may be that B.'s only right is to cut back the overhanging portions (*y*). But B. has a right of action where the overhanging branches are actually doing damage, e.g., through interfering with the growth of B.'s fruit trees (*z*), or where the leaves are poisonous, through B.'s cattle dying from eating them (*a*). On the other hand, B. has no right of action if his cattle eat poisonous leaves on the branches of trees on A.'s land, but which branches do not overhang B.'s land (*b*), nor possibly if poisonous leaves from branches which do not so overhang fall on to B.'s land (*c*).

In *Lemmon v. Webb* (*d*) it was held by the House of Lords that the owner of land which is overhung by trees growing on his neighbour's land is entitled without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, even though they have done so for more than twenty years.

Boundary buildings.

As regards buildings near a boundary, it has been laid down that to place things projecting into the air over another's land is actionable (*e*). But where one of two adjoining houses is built so as to protrude into or over the other, the protrusion may, by grant, reservation, or otherwise, be as of right (*f*). This is continually done at the present day in the case of buildings with cornices re-turned at the ends so as to project over the perpendicular boundary line of the next building. The right would be an easement (*g*).

(*u*) Arts. 671—2—3, Code Civil; Pardessus, *Traité des Servitudes*, 297.

(*x*) *Lemmon v. Webb*, 1895, A. C. 1; 64 L. J. Ch. 205.

(*y*) *Smith v. Giddy*, 1904, 2 K. B. 451; 73 L. J. K. B. 894. See *Pickering v. Rudd*, 1815, 4 Camp. 319; 16 R. R. 777.

(*z*) *Smith v. Giddy*, *sup.*

(*a*) *Crowhurst v. Amersham*, 1878, 4 Ex. D. 5; 48 L. J. Ex. 109.

(*b*) *Ponting v. Noakes*, 1894, 2 Q. B. 281; 63 L. J. Q. B. 549.

(*c*) See *Wilson v. Newberry*, 1871, L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; *Giles v. Walker*, 1890, 24 Q. B. D. 656;

59 L. J. Q. B. 416; *Smith v. Giddy*, 1904, 73 L. J. K. B. 896.

(*d*) 1894, 3 Ch. 1; on appeal, 1895, A. C. 1; 64 L. J. Ch. 205.

(*e*) See *Pickering v. Rudd*, 1815, 4 Camp. 219; 16 R. R. 777; *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823; *Martyr v. Lawrence*, 1864, 2 De G. J. & S. 261.

(*f*) See *Corbett v. Hill*, 1870, 9 Eq. 671; 39 L. J. Ch. 547; *Francis v. Hayward*, 1882, 22 Ch. D. 177; 52 L. J. Ch. 12; *Laybourn v. Gridley*, 1892, 2 Ch. 53; 61 L. J. Ch. 352.

(*g*) *Harris v. De Pinna*, 1886, 33 Ch. D. 260; 56 L. J. Ch. 344.

PART IV.

OF THE INCIDENTS OF EASEMENTS.

THE INCIDENTS of Easements may be considered with reference to—

1st. The obligation and right to do the acts necessary for the enjoyment of the easement—e.g., repairs; deviation.

2nd. The secondary easements ancillary to, and depending upon, the primary easements.

3rd. The extent and mode of enjoyment.

CHAPTER I.

OBLIGATION AND RIGHT TO REPAIR: AND HEREIN OF THE RIGHT TO DEVIATE.

A. The Position of the Servient Owner.

As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything. Apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment, or convenient enjoyment, of the easement by the owner of the dominant tenement (a).

Position of
servient
owner.

Servient
owner not
prima facie
bound to
repair.

“Where I grant a way over my land, I shall not be bound to repair it,” said Twisden, J., in *Pomfret v. Ricroft* (b). “The grantor of a way is not bound to repair it if it be foundrous” (c).

This is in accordance with the principles of the civil law, which imposed the burden of repair in cases of easement upon the owner of

(a) Per Parker, J., *Jones v. Pritchard*, 1908, 1 Ch. 637; 77 L. J. Ch. 405; *Huggett v. Miers*, 1908, 2 K. B. 283; 77 L. J. K. B. 710. See *Buckley v. Buckley*, 1898, 2 Q. B. 614; 67 L. J. Q. B. 953.

(b) 1669, 1 Saund. 322 a; see also *Gerrard v. Cooke*, 1806, 2 Bos. & P. N. R.

109.

(c) Com. Dig. Chimin (D. 6). Cf. 1 Wms. Saund. 322 c; 1 Notes to Saund. 566; *Colebeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234; 45 L. J. Q. B. 225; *Macclesfield v. Grant*, 1882, 51 L. J. Q. B. 357.

Repairs :
position of
servient
owner.

the dominant and not upon the owner of the servient tenement (*d*). By the French Code Civil (*e*) the expenses incurred in constructing any works necessary for the use or preservation of any easement must be borne by the party entitled to it.

Servient
owner
may be liable
to repair
either by
prescription
or contract
express or
implied.

Although, according to the civil law, no easement (with the single exception of the *servitus oneris ferendi*) could exist which imposed on the owner of the servient tenement an obligation to repair, and any stipulation to that effect was personal, binding on the contracting parties only, and not imposing any charge upon the inheritance, so as to pass with it into the hands of a new owner (*f*), yet there is little doubt that, by the law of England, such an obligation may be imposed either by express contract or prescription. Thus, it was said by Mr. Serjeant Williams in the note to *Pomfret v. Ricroft* (*g*), "the grantor of a right of way may be bound either by express stipulation or prescription to repair it": and he cites the case of *Rider v. Smith* (*h*), in which an action was brought against the owner of a close for not keeping in repair a footway running across it, and the Court held that a declaration alleging that, "by reason of his possession," the defendant ought to repair was good on demurrer, and that the special matter of the obligation might be given in evidence, thus recognizing, at all events, the possibility of such an obligation being established. Again, it has been said that the grantor of an easement may bind himself to repair either in express terms or by necessary implication (*i*).

Early cases
as to liability
of servient
owner to
repair.

The question of the liability of the servient owner to repair appears to have been raised in some old cases.

In *Fitz. Nat. Brev.* (*j*) there is a writ commanding the mayor and sheriff of a town to summon one before them for not repairing his cellar, to the damage of him who has a cellar beneath it, which by the custom of the said town he was bound to repair. The other writ *de reparatione faciendâ* (*k*) is the case of a house becoming ruinous and dangerous to the neighbouring houses.

There is a case in *Keilwey* (*l*), as follows: "It seems to Fineux and Brudnell in the K. B., that where I have a chamber below (meason pavaile), and another has a chamber above mine (haute meason), as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the

(*d*) In omnibus servitutibus reffectio ad eum pertinet, qui sibi servitutem adserit, non ad eum cujus res servit.—*Dig.* 8, 5, 6, § 2; *ib.* 8, si serv. vind.

(*e*) *Art.* 698.

(*f*) See post, p. 427.

(*g*) 1669, 1 *Saund.* 322 a.

(*h*) 1790, 3 T. R. 706.

(*i*) *Miller v. Hancock*, 1893, 2 Q. B. 181; *Huggett v. Miers*, 1908, 2 K. B. 283, 286; 77 L. J. K. B. 710.

(*j*) 121 F.

(*k*) 127 C.

(*l*) 98 b.

salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber for the salvation of his chamber above.—Nota et stude. For some at the bar think that I may suffer my chamber to fall down (deschuer); but all were agreed that I could not abate my chamber to the destruction of the upper chamber (*m*), and the manner for me to compel another to sustain his chamber, ut suprà, *if the law be such*, is by action on the case, &c.

Repairs :
position of
servient
owner.

So it is said by Rainsford, J., in *Pomfret v. Ricraft* (*n*): "If a man demise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor."

The case in *Keilwey* was doubted by Lord Holt in *Tenant v. Goldwin* (*o*), where he said "he thought the writ in Fitzherbert must be founded upon the particular custom of places." Serjeant Williams, in his note to *Pomfret v. Ricraft* (*p*), observes: "It is difficult to say upon what other ground but custom such an action can be supported."

In *Edwards v. Halinder* (*q*) an action was brought by the tenant of a cellar against the tenant of the room above, both holding under the same landlord, for overloading his floor, whereby it fell through and destroyed the plaintiff's wine in the cellar beneath. The defendant pleaded: "That, before the charging of the floor, ut suprà, the said floor had sustained greater weight, and, further, that the landlord let the said shop to him, to lay there the weight of thirty tons, and he had laid there but the weight of twelve tons; and also that the walls of the said cellar were so weak that the floor of the said shop fell by reason thereof." Upon which there was a demurrer in law, and judgment was given for the plaintiff, which was affirmed on a writ of error in the Exchequer Chamber, as it would appear, upon the ground that there being no traverse of the fact charged in the declaration—the overloading—the plea was impertinent. Nothing whatever was decided as to the liability to repair. Gent, B., was of opinion: "That the defendant had not fully answered the declaration, for he was charged with the laying too much weight on the floor there, so as vi ponderis it fell down; to which the defendant has said that the walls were ruinous in occultis partibus, and doth not answer to the surcharging (seil.) absque hoc,

(*m*) Vide per Parke, B., in *Harris v. Ryding*, 1839, 5 M. & W. 71; 8 L. J. (N. S.) Ex. 181; 52 R. R. 632.

Ld. Raym. 1089.

(*p*) 1669, 1 Wms. Saund. 558.

(*q*) 1584, 2 Leon. 93; S. C., Popham, 46.

(*n*) 1669, 1 Saund. 322.

(*o*) 1705, 1 Salk. 360; S. C., 2

Repairs :
position of
servient
owner.

that he did surcharge." Clarke, B., agreed with Gent, B., as it appears, in opposition to Manwood, C.B., who thought no traverse was necessary. The report in Popham gives the argument in the Exchequer Chamber; from which it appears that the judgment was affirmed on the same ground that it was given below.

In an anonymous case (r) it is said: "If a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room, they over him may have an action to compel him to keep up and maintain his foundation. Sed quære. For if a man build a new house under the roof of an old one which is ready to tumble, whether he shall have a writ de reparatione faciendâ, because debet et consuevit are necessary words in the declaration." Holt, C.J., said: "That every man of common right ought so to support his own house as that it may not be an annoyance to another man's" (s).

The report of the case in Keilwey in reality amounts to no more than a statement that such a point had been agitated. The dictum of Rainsford, J., in *Pomfret v. Ricroft*, was probably founded, according to Serjeant Williams, upon this report; there seems also some doubt whether it did not proceed on the ground of a covenant implied in the demise. The writ in Fitzherbert is obviously founded on a local custom only; and the case in Leonard went off entirely on a point of pleading. There appears, therefore, to be no authority whatever to oppose to the opinion of Lord Holt (t).

The following cases are given in the American edition of this book, by "E. Hammond, Counsellor at Law," New York, 1840:—

In *Loring v. Bacon*, 4 Mass. Rep. 575, the question arose whether the owner of the lower part of the house was obliged to contribute to the repairs of the upper part. Parsons, C.J., in delivering the judgment of the Court, says: "The plaintiff declares in case upon several promises. The first count is indebitatus assumpsit in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labour, and victualling the workmen. The second count is a quantum meruit for the same items, technically supposed to be different but similar. The third count is a general indebitatus assumpsit for eighty dollars, laid out and expended.

"The facts being agreed by the parties, the question of law comes before the

(r) 1796, 11 Mod. 7.

(s) See this dictum referred to per Cur. in *Alston v. Grant*, 1854, 3 E. & B. 128; 23 L. J. Q. B. 163; 97 R. R. 404. But he is not bound to repair it, but only to prevent his neighbour from being injured by its fall (*Chauntler v. Robinson*, 1849, 4 Exch. 163; 19 L. J. Ex. 170; 80 R. R. 507, per Cur.). Note the distinction between such cases and those in which, although there be

no duty to repair, yet the defendant is held liable for injury caused by a use of some part of his premises, ex. gr., a drain, which, by reason of its improper construction, causes damage to the neighbour's house, as in *Alston v. Grant*, ubi sup.

(t) See Serjeant Williams' note, 1 Wms. Saund. 558; *Colebeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234; 45 L. J. Q. B. 225.

Court on the case stated. From this case, it appears, that the defendant is seised in fee simple of a room on the lower floor of a dwelling-house, and of the cellar under it; and that the plaintiff is seised in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair, that unless repaired no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired the respective parts of the house at their several expenses. And the question submitted to the Court is, whether the plaintiff can recover in this action.

Repairs :
position of
servient
owner.

"This is an action of the first impression. No express promise is admitted; but, if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

"We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

"Although, in the case, the parties consider themselves as severally seised of different parts of one dwelling-house, yet, in legal contemplation, each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house. And in the action it appears that, having repaired his own house, he calls upon her to contribute to the expenses, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage if he had not repaired.

"Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff.

"Houses for the habitation, and mills for the support of man, are of high consideration at common law; and, when holden in common or joint tenancy, remedies are provided against those tenants, who refuse to join in necessary reparation, by the writ de reparatione faciendâ; Co. Litt. 200 b; Fitz. N. B. 295. In Co. Litt. 56 b, it is said, that if a man has a house so near to the house of his neighbour and he suffers it to be so ruinous that it is likely to fall on his neighbour's house, he may have a writ de domo reparandâ, and compel him to repair his house. In Keilwey, 98 b, pl. 4, there is a case reported, in the time of Henry the Eighth, in which Fineux and Brudnell, justices of the King's Bench, were of opinion, that if a man have a house underneath, and another have a house over it, as in the case in London, the owner of the first house may compel the other to cover the house, to preserve the timbers of the house underneath, and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in Fitz. N. B. 296, there is a writ of this kind. But in the case of *Tenant v. Goldwin*, 1794, 6 Mod. 314, Lord Holt was of opinion that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in Keilwey.

"But there is unquestionably a writ at common law, de domo reparandâ, the form of which we have in Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used, to repair, &c. This writ, Fitzherbert says, lies when a man, who has a house adjoining to the house of his neighbour, suffers his house to lie in decay to the annoyance of his neighbour's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until

Repairs :
position of
servient
owner.

he do it. But it is otherwise in an action of the case : for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

"But if the case in *Keilwey* is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

"If the case in *Keilwey* is not law, then, upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

"In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in *Keilwey* ; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called."

In *Cheeseborough v. Green*, 10 Conn. 318, which was an action on the case brought by the owner of the lower part of a store against the owner of the upper part and roof of the building to recover damages for suffering the roof to be out of repair, the Court held, that the action could not be sustained ; in a Court of Chancery only can the plaintiff have adequate remedy. Daggett, C.J. : "The declaration, in substance, is that the plaintiff owns the first and second stories of a brick store, and the defendant owns the third story and roof. The defendant has suffered the roof to decay and become leaky and ruinous, so that the lower part of the building is injured, and for this neglect of the defendant this action is brought. The Superior Court, on a trial, found the facts alleged true, but adjudged the declaration insufficient. It is now to be decided by this Court, whether this action can be sustained. There is no statute, nor any custom, nor any adjudged case in Connecticut on the subject. The plaintiff relies upon the principles of the common law to uphold this action. He founds himself principally on a case, *Keilwey*, 98 b. pl. 4, where the doctrine was laid down by two judges of the Court of King's Bench. In *Tenant v. Goldwin*, 1794, 6 Mod. 314 ; S. C., 1 Salk. 360, Lord Holt disapproved of the case in *Keilwey*, and said, that it was supported by the custom of particular places, and not by the common law. There was a writ de reparatione faciendâ against those of several joint tenants, or tenants in common, who refused to join in necessary repairs. So if the house of A. be near that of B., and the former becomes so ruinous that it endangers the latter, B. may have a writ de domo reparandâ, and compel A. to repair his house. I am not aware that any such writ has been known in the practice of our courts. Perhaps an action on the case would lie against any one who should negligently suffer his building to decay, and fall on and injure the property of another, on the maxim *Sic utere tuo ut alienum non lædas*. That, however, is not this case.

"Nor can we say, in the absence of statute regulation, or express decision, that this doctrine is so reasonable that an action can be sustained. In large cities, houses generally consist of four or five stories. The owner of the fifth story, upon the principle assumed by the plaintiff, is compellable to furnish a sufficient roof to protect the whole building against water. Also, the owner of each story is obliged to secure the side and ends, as the case may be, against the entrance of water to the annoyance of all those who own or occupy below. The owner of the lower story is compellable, also, to keep the foundation suitably repaired, to sustain each of the other stories, with their additional (as the case may be) superincumbent weight.

"These considerations, and others easily suggested, would lead to the conclusion, that a remedy in such case can be furnished only by a Court of Chancery.

The principles adopted by Chancellor Kent in *Campbell v. Mesier & al.*, 4 Johns. Ch. Rep. 334, countenance this idea. The case of *Loring v. Bacon*, 4 Mass. Rep. 575, was pressed by the counsel for the plaintiff. There, it was decided, that the owner of the upper story could not recover in assumpsit against the owner of the floor and cellar for necessary repairs to the roof. Chief Justice Parsons speaks of the case in Keilwey, without deciding on its authority. He does not decide the plaintiff to be without remedy: he says truly, he has no legal ground for recovery. It will be borne in mind, that there was then (1806) no Court of Chancery in Massachusetts.

Repairs :
position of
servient
owner.

In *Graves v. Burdan* (26 N. Y. 501), Judge Rosekrans says: "The rule seems to be settled in England, that when a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground-floor is bound by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story." (See Washburn on Easements, 564 to 573.)

As bearing upon the liability of the servient owner to effect repairs on property over which other persons have rights of user, reference should be made to recent decisions in the case of flats. Where different parts of the same building are let out separately to different tenants questions have been raised as to the liability of the landlord in respect of those parts of the building retained by him in his possession and control and which are necessary for the convenient use of the several demised premises. As regards a common staircase, it has been laid down that an obligation is imposed upon the landlord to avoid traps (*u*). Thus, where a visitor who had in the course of business called on one of the tenants and sustained injury from the defective condition of the staircase, the landlord was liable to the visitor (*x*). But where the circumstances excluded the implication of an agreement by the landlord to light the staircase, the landlord was not liable to the employé of a tenant who sustained injury from the staircase being in darkness (*y*). Nor was the landlord liable to a tenant's wife who sustained injury from the steps of approach to the building being unfenced, where the danger was patent to every one, and the wife knew of it (*z*).

Liability of
landlord of
flats in
respect of
the parts of
the building
retained
by him.

As regards gutters in the roof of the building, the landlord must take reasonable care to keep them in repair and proper order, and in the absence of this may be liable to a tenant for damage (*a*).

(*u*) *Lucy v. Bawden*, 1914, 2 K. B. 325; 83 L. J. K. B. 523.

(*x*) *Miller v. Hancock*, 1893, 2 Q. B. 177, where the evidence was consistent with the defect being in the nature of a trap (see 1914, 2 K. B. 324). Compare the Scotch case of *McMartin v. Hannay*,

10 Ct. of Sess. Cases, 3rd series, 411.

(*y*) *Huggitt v. Miers*, 1908, 2 K. B. 278; 77 L. J. K. B. 710. See *Lewis v. Ronald*, 1909, 26 T. L. R. 30.

(*z*) *Lucy v. Bawden*, *ubi sup.*

(*a*) *Hargroves v. Hartopp*, 1905, 1 K. B. 472; 74 L. J. K. B. 233.

Repairs :
position of
servient
owner.

Civil law.

But he is not liable for damage which reasonable care would not prevent (*b*).

As regards a lift, the landlord was in one case held liable for not taking proper precautions to prevent persons falling down the lift (*c*). But where an accident occurred which was due to the nature of the lift provided by the landlord, he was not liable on the alleged ground that a better lift might have been used (*d*).

As regards a part of the building retained by the landlord in his own possession, which part was not necessary for the convenient use of the demised premises, but which the tenants had the landlord's licence to use if they chose, the landlord was held to be under no liability to keep the fence in repair (*e*).

The servitude of the civil law, called "*paries oneri ferendo*," imposed upon the owner of the servient tenement the obligation not only of supporting the dominant edifice, but also of keeping his own buildings in such a state of repair as should enable them to sustain the pressure. The validity of this servitude, though admitted to be of an anomalous character, appears to have been fully established, notwithstanding some difference of opinion upon this subject (*f*); but still it was said that the obligation was not upon the person, but upon the tenement, and that by relinquishing the tenement the owner's liability to repair was determined (*g*).

(*b*) *Carstairs v. Taylor*, 1871, L. R. 6 Exch. 217; 40 L. J. Ex. 129. See *Blake v. Woolf*, 1898, 2 Q. B. 426; 67 L. J. Q. B. 813; *Odell v. Cleveland*, 1910, 26 T. L. R. 410.

(*c*) *Steer v. St. James Co.*, 1887, 3 T. L. R. 500; see *Matthieson v. Pollock*, 1910, Court of Session Cases, 11.

(*d*) *Powell v. Thorndike*, 1910, 26 T. L. R. 399.

(*e*) *Ivay v. Hedges*, 1882, 9 Q. B. D. 80.

(*f*) Eum debere columnam restituere, quæ onus vicinarum ædium ferebat, cuius essent ædes, quæ servirent: non eum, qui imponere vellet: nam eum in lege ædium ita scriptum est —*paries oneri ferendo, uti nunc est, ita sit*—satis aperte significari, in perpetuum parietem esse debere; non enim hoc his verbis dici. "ut in perpetuum idem paries æternus esset," quod ne fieri quidem posset, sed "uti ejusdem modi paries in perpetuum esset qui onus sustineret;" quemadmodum, si quis alicui cavisset, ut servitutem præberet, qui onus suum sustineret, si ea res, quæ servit, et tuum onus ferret, perisset, alia in locum ejus dari debeat.—Dig. 8, 2, 33, de serv. præd. urb.

In servitute oneris ferendi hoc amplius est, quod vicinus columnam aut parietem qui oneri ferendo est reficere tenetur, et idoneum onere sustinendo præstare, quâ parte servitus hæc degenerat et spuria esse agnoscitur—quippe eum contra naturam servitutem hoc sit ut quis cogatur aliquid facere in suo.—Vinnius, Inst. Lib. 2, tit. 3, de serv. urb. § 3.

Etiam de servitute, quæ oneris ferendi causâ imposita erit, actio nobis competit, ut et onera ferat, et ædificia reficiat ad eum modum, qui servitute imposita comprehensus est. Et Gallus putat, non posse ita servitutem imponi, "ut quis facere aliquid cogeretur," sed "ne ne facere prohiberetur;" nam in omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adserit; non ad eum, cuius res servit. Sed evaluit Servii sententia in propositâ specie, ut possit quis defendere, jus sibi esse, cogere adversarium reficere parietem ad onera sua sustinenda.—Dig. 8, 5, 6, § 2, si serv. vind.

(*g*) Labeo autem hanc servitutem non hominem debere, sed rem; denique licere domino rem derelinquere, scribit.—Ib.

This obligation to repair was, however, strictly construed, and did not carry with it as an incident any obligation to furnish support to the dominant tenement during any necessary reparation of the servient tenement. In this respect the owner of the dominant tenement was bound to take care of himself, by shoring or other means, or, if he neglected so to do, he might "take down his house (*h*) and rebuild it when the wall was restored" (*i*).

Repairs :
position of
servient
owner.

The analogous servitude, "tigni immittendi," clearly imposed no obligation on the owner of the servient tenement to keep his walls in repair; the right conferred was "to insert a beam into the neighbour's wall, so that it might remain there, and the neighbour's wall might sustain the weight," but nothing beyond this (*j*).

The civil law recognizes the existence of the easement *oneris ferendi* as distinguished from the ordinary easement of support *tigni immittendi*; but it appears that the additional obligation of repair could only be imposed by an express stipulation to that effect in the instrument creating the easement (*k*), or at all events there must

Hæc autem actio in rem magis est, quam in personam: et non alii competit, quam domino ædium, adversus dominum; sicuti cæterarum servitutum intentio.—*Ib.* § 3.

(*h*) "Ironical counsel," says Pothier.

(*i*) Sicut autem reformatio parietis ad vicinum pertinet, ita futura ædificiorum vicini, cui servitus debetur, quamdiu paries reficietur, ad inferiorem vicinum non debet pertinere; nam, si non vult superior fulcire, deponat: et restituet cum paries fuerit restitutus. Et hic quoque sicut in cæteris servitutibus, actio contraria dabitur: hoc est, *jus tibi non esse me cogere.*—*Dig.* 8, 5, 8, si serv. vind.

(*j*) In imponendâ servitute tigni immittendi hoc agitur, ut ex nostro pariete liceat tignum trabem immittere in parietem vicini ita ut ibi requiescat, et vicini paries sustineat onus immissi—*nihil amplius.*—*Vinnius, Inst. Lib.* 2, tit. de serv. urb. 3.

Competit mihi actio adversus eum, qui cessit mihi [talem] servitutem, ut in parietem ejus tigna immittere mihi liceat, supràque ea tigna (verbi gratiâ) porticum ambulatoriam facere, superque eum parietem columnas struere imponere, quæ tectum porticus ambulatoriæ sustineant.—*Dig.* 8, 5, 8, § 1, si serv. vind.

Distant autem hæ actiones (i.e., *oneris ferendi* et *tigni immittendi*) inter se: quod superior quidem locum habet

etiam ad compellendum vicinum reficere parietem [meum]; hæc vero locum habet ad hoc solum, ut tigna suscipiat: quod non est contra genera servitutem.—*Ib.* § 2.

(*k*) Modus autem refectionis in hac actione ad eum modum pertinet, qui in servitute impositâ continetur: forte, ut reficiat lapide quadrato, vel lapide structili, vel quovis alio opere, quod in servitute dictum est.—*Dig.* 8, 5, 6, § 5, si serv. vind.

"Il ne faut pas croire, avec le plus grand nombre des interprètes au droit, que la servitude *oneris ferendi* ait été une exception à cette règle. Il était bien d'usage de stipuler dans cette servitude, que le voisin serait obligé de reconstruire et d'entretenir le mur, ou le pillier qui soutenait quelque partie du bâtiment voisin; mais c'était là l'effet, non pas du droit de servitude en lui-même, mais d'une stipulation particulière, ajoutée au droit de servitude. Encore Aquilius Gallus, l'un des plus célèbres jurisconsultes Romains, prétendait-il que cette obligation était contraire à la nature des servitudes. Les autres jurisconsultes se contentaient de dire que le voisin pouvait se libérer de cette obligation en abandonnant le fonds sur lequel le mur, ou la colonne, qui portait l'édifice voisin, était situé; et dans tout cas, le propriétaire du fonds dominant n'en pouvait pas demander le rétablissement par l'action réelle *confessoria servitutis*, mais seule-

Repairs :
position of
servient
owner.

have been a prescriptive right to the repair, as well as to the support. Indeed, it has been doubted whether such an easement could exist at all, unless the precise technical expression "*paries oneri ferendo*" was inserted in the original grant (*l*).

Code Civil.

By the French Civil Code, when the different stories of a house belong to different proprietors, their respective rights and liabilities are fixed with great minuteness—supposing the instruments creating their respective titles to contain no provision for repair. The main walls (*gros murs*) and roof are kept in repair at the expense of all the proprietors, each contributing according to the value of the portion which belongs to him : the proprietor of each story is bound to keep in repair his own floor ; the proprietor of the first story is bound to keep in repair the staircase leading up to it ; the proprietor of the second is bound to keep in repair that part of the staircase which leads from the first story to him ; and so with regard to the other proprietors (*m*).

Scotch law.

The Scotch law, which to a great extent is based upon the civil law, is in accordance with the doctrine, "that, to impose such an obligation to repair on the owner of the servient tenement, there must be either an express stipulation to that effect, or actual proof that there is a prescriptive right to the repair as well as to the support."

Lord Stair.

"The precise positive servitude of city tenements," says Lord Stair, "is the servitude of support, whereby the servient tenement is liable to bear any burden for the use of the dominant, and that either by laying on the weight upon its walls or other parts thereof, or by putting in joists, or other means of support, in the walls of the same, which the Romans called *servitutem tigni immittendi* ; or otherwise, this servitude may be by bearing the pressure, or putt, of any building, for the use of the dominant tenement, as of a vault, or pend, or the like ; such is the servitude of superstructure whereby any building may be built upon the servient tenement. Like unto which is now frequent in Edinburgh when one tenement is built above another at diverse times, or diverse stories or contignations of the same tenement are bought by diverse proprietors, and thereby the upper becomes a distinct tenement, and hath a servitude upon the lower tenements, whereby they must support it. The question useth to be moved here, whether the owner of the servient tenement be obliged to uphold or repair his tenement, that it may be sufficient to support the burden of the dominant tenement ?

ment en vertu de l'équité, *imploratione officii judicis*."—Merlin, *Répertoire de Jurisprudence*, tit. Servitude, p. 44.
(*l*) Stair's *Instit.* 328 ; Erskine,

Instit. 431. See *Macclesfield v. Grant*, 1881, 51 L. J. Q. B. 357.
(*m*) Art. 664 ; Pardessus, *Traité des Servitudes*, 288.

“ There are opinions of the learned and probable reasons upon both facts : for the affirmation maketh the common rule that when anything is granted, all things are understood to be granted therewith that are necessary thereto ; so he who constituteth upon his tenement a servitude of support must make it effectual ; and for that negative servitudes are odious, and not to be extended beyond what is expressly granted or accustomed, to which we incline ; and, therefore, it would be adverted how the servitude is constituted, that if it appear the constituent had granted this servitude so as to uphold it, not upon the account of his own tenement, but of the dominant, he must so continue ; and it is not only a personal obligation, but a part of the servitude passing with the servient tenement, even to singular successors : but if it appear not so constituted, it will impart no more than a tolerance to lay on or impute the burden of the dominant tenement upon the servient, which, therefore, the owner of the servient neither can hinder nor prejudice ; but he is not obliged to do any positive deed by reparation of his own tenement to that purpose ; but the owner of the dominant tenement hath right to repair it for his own use, by reason of his servitude, and the owner of the servient tenement cannot hinder him ; yea, in what he thereby advantages the servient tenement, he hath upon the owner thereby the natural obligation of recompense in quantum lucratus.

Repairs :
position of
servient
owner.

“ If it be objected that, within burgh, the owners of the inferior and supporting tenements are obliged to repair for the behoof of the superior tenements, the owners whereof may legally enforce reparation ; yet it inferreth not this to be the nature of a servitude, but a positive statute or custom of the burgh for the public good thereof, which is concerned in upholding tenements. But mainly the reason of it is, because when diverse owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both ; and therefore, by the nature of communion, there are mutual obligations upon both, viz., that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and cover to the lower, both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party ” (n).

(n) Stair's Institutes, Bk. 2, Tit. 7, s. 6.

Repairs :
position of
servient
owner.

Liability of
an individual
to repair a
highway.

A question somewhat similar to the questions above discussed arises in the case of a public highway or bridge. In these cases the obligation to repair is imposed by the common law upon the parish or county (*o*). But an individual may be bound to repair either by prescription (*p*) or by *ratione tenuræ*, that is, by reason of his tenure of particular land (*q*). Or he may be so bound by *ratione clausuræ*, that is, where, the public having a right to deviate from a highway on to the adjoining land, and the owner enclosing such land by a fence, the occupier becomes liable *ratione clausuræ* to repair the highway (*r*).

The liability *ratione tenuræ* to repair a highway may be established on the ground of a licence presumed to have been granted by the Crown (*s*). A similar liability arising *ratione tenuræ* or by prescription is usually established by showing that for a number of years the persons charged and their predecessors have done the repairs (*t*). But if it appears that these repairs had been done by these persons or their predecessors for their own convenience or benefit this will not be sufficient (*u*).

An individual who has been injured by the non-repair of a highway can sue a corporation liable by charter to do the repairs (*x*). But it is doubtful whether he can sue an individual whose liability to do the repairs arises by prescription or *ratione tenuræ* (*y*).

(*o*) *R. v. Wills*, 1705, 1 Salk. 359. At common law, if a highway be dedicated subject to the existence of a cellar, the owner or occupier is not liable to repair the cellar roof or fixed gratings if the public traffic wears them out (*Robbins v. Jones*, 1863, 15 C. B. N. S. 221; 33 L. J. C. P. 1; 137 R. R. 475).

(*p*) 13 Rep. 33. To support a prescriptive liability to repair a highway, some consideration or profit must be shown (*ib.*; *R. v. St. Giles*, 1816, 5 M. & S. 260; 17 R. R. 320; *R. v. Ashby Folville*, 1866, L. R. 1 Q. B. 216; 35 L. J. M. C. 154). As to prescriptive liability to repair a bridge, see *R. v. Lincoln*, 1838, 8 A. & E. 65; 7 L. J. (N. S.) Q. B. 161; 47 R. R. 484; *Hertfordshire Council v. New River Co.*, 1904, 2 Ch. 521; 74 L. J. Ch. 49.

(*q*) 2 Inst. 700; Com. Dig. Chimin, A. 4; *R. v. Buccleugh* (3 Anne), 6 Mod. 150; *R. v. Bucknell* (1 Anne), 7 Mod. 55; *R. v. Manners Sutton*, 1835, 3 A. & E. 597; 4 L. J. (N. S.) K. B. 215; 42 R. R. 490; *Baker v. Greenhill*, 1842, 3 Q. B. 148; 11 L. J. Q. B. 161; 61 R. R. 173; *R. v. Barker*, 1890, 25

Q. B. D. 213; 59 L. J. M. C. 105; *Cuckfield v. Goring*, 1898, 1 Q. B. 865; 67 L. J. Q. B. 539; *Daventry v. Parker*, 1900, 1 Q. B. 1; 69 L. J. Q. B. 105. As to exemption from highway rates for a person bound to repair a highway *ratione tenuræ*, see *Heath v. Weaverham*, 1894, 2 Q. B. 108; 63 L. J. M. C. 187; *Dalton v. N. E. R.*, 69 L. J. Q. B. 650; 1900, A. C. 345; *Ferrand v. Bingley*, 1903, 2 K. B. 445.

(*r*) *R. v. Ramsden*, 1858, E. B. & E. 949; 27 L. J. M. C. 296; 113 R. R. 958; 2 Wms. Saund. 483.

(*s*) *Esher v. Marks*, 1902, 18 T. L. R. 333; 71 L. J. K. B. 309.

(*t*) *R. v. Skinner*, 1805, 5 Esp. 219; *R. v. Hatfield*, 1820, 4 B. & Ald. 75; 43 R. R. 322.

(*u*) *Macclesfield v. Grant*, 1881, 51 L. J. Q. B. 357; *Rundle v. Hearle*, 1898, 2 Q. B. 83; 67 L. J. Q. B. 741.

(*x*) *Lyme Regis v. Henley*, 1834, 1 Bing. N. C. 222; 37 R. R. 125.

(*y*) See, on the one hand, *Young v. Davis*, 1862, 7 H. & N. 773; 31 L. J. Ex. 250; 126 R. R. 686; *Rundle v. Hearle*, 1898, 2 Q. B. 88; 67 L. J. Q. B. 741. See, on the other hand, *Russell v.*

It seems to be laid down in the Year Books (29 Ed. 3, 32 b) that if a man, who is bound by tenure to repair a certain causeway by prescription, does not repair it, per quod my land is surrounded, I may have an action on the case against him. Again, "sicut poterit quis facere nocumentum injuriosum in faciendo, ita poterit in non faciendo, in proprio vel in alieno, ut si ex constitutione obstruere et claudere, purgare et reficere, et non fecerit, cum ad hoc teneatur" (z).

Repairs :
position of
servient
owner.

The owner of land fronting the sea may be bound by prescription to maintain a sea wall for the protection of the adjoining owner (a). A riparian proprietor may also be under a liability to keep up the bank of a tidal river (b), and a corporation may be liable by charter to maintain the sea defences of a town (c).

Liability to
maintain
sea walls
and banks.

A servient owner through whose land a watercourse runs may, it seems, be subject to an obligation to cleanse the watercourse for the benefit of a lower riparian proprietor (d).

In connection with the position of the servient owner as regards repair, reference should be made to the spurious easement which sometimes binds an owner of land to maintain his fences in a certain condition (e).

B. The Position of the Dominant Owner.

By the common law a right is conferred upon the dominant owner to do all those acts which may be necessary to secure the full enjoyment of the easement, even though he should thereby be compelled to commit a trespass (f). This right was recognized in a very early case (g). Choke, J. : "If a man grant me (a right) to dig in his land and to make a trench from a certain fountain or spring to my place, so that I may lay down a pipe to convey the water to my place, if afterwards the pipe is stopped or broken so that the water run out

Right of
dominant
owner to
repair.

9 Edw. 4.

Devon, 1788, 2 T. R. 667 ; 1 R. R. 585 ; *Lyme Regis v. Henley*, 1832, 3 B. & Ad. 77 ; 37 R. R. 125 ; *McKinnon v. Penson*, 1853, 8 Ex. 319 ; 22 L. J. M. C. 57 ; 91 R. R. 510 ; *Bathurst v. Macpherson*, 1879, 4 App. Cas. 267 ; 48 L. J. P. C. 61.

(z) Bracton, Lib. 4, f. 232 b ; Com. Dig. Chimin, D. 6.

(a) *Hudson v. Tabor*, 1877, 2 Q. B. D. 292 ; 46 L. J. Q. B. 463 ; *R. v. Essex*, 1885, 14 Q. B. D. 561 ; 11 App. Cas. 449 ; 56 L. J. M. C. 1 ; *L. & N. W. R. v. Fobbing*, 1897, 66 L. J. Q. B. 127.

(b) *Nitrophosphate Co. v. London and St. Katharine's Docks Co.*, 1877, 9 Ch. D. 503 ; *Rust v. Victoria Co.*, 1886, 36 Ch. D. 113. As to liability to repair

river banks, see Com. Dig., tit. Abatement, H.

(c) *Lyme Regis v. Henley*, 1834, 1 Bing. N. C. 222 ; 37 R. R. 125.

(d) *Bell v. Twentymann*, 1841, 1 Q. B. 766 ; 10 L. J. Q. B. 278 ; 55 R. R. 415.

(e) See ante, p. 409.

(f) But in the case of a highway there is no right to repair where there is no obligation to repair ; and therefore where the obligation to repair is in a local authority, its default does not give a right to any other persons to do the necessary repairs (*Campbell Darys v. Lloyd*, 1901, 2 Ch. 518 ; 58 L. J. Ch. 424).

(g) 9 Edw. 4. 35.

Repairs :
position of
dominant
owner.

Pomfret v.
Ricroft.

Right of
dominant
owner to
repair.

of it, I cannot dig in his land to amend the pipe—for this was not granted to me—but if he grant that I may dig, &c., to amend the pipe, totiens quotiens, &c., then I shall dig. And, in like manner, if I prescribe to have such a conduit, I must also prescribe to scour and amend it, totiens quotiens, &c., or otherwise I cannot dig in his land to amend, &c. But this was denied in both cases, for it was said by the Court, that it is incident to such a grant to scour and amend " (*h*). Again, in *Pomfret v. Ricroft* (*i*) it was held that where a party had an easement to use a pump in his neighbour's land, " although neither the soil nor the pump itself was granted to him, yet by the grant of the use of the pump the law had given him the liberty (to enter upon the land and repair the pump) ; for, when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me " (*j*). In *Pomfret v. Ricroft* the action (which was in covenant) was brought by the grantee of the easement for a breach of the implied covenant to repair on the part of the grantor. The Court of King's Bench gave judgment for the plaintiff, which was afterwards reversed in the Exchequer Chamber upon the grounds above given.

In modern cases a similar doctrine has been laid down. Thus, it has been said the grantee of an easement for a watercourse through his neighbour's land may when reasonably necessary enter his neighbour's land for the purpose of repairing, and may repair, such watercourse (*k*). Again, the grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective. That includes not only keeping the road in repair, but the right of making a road (*l*). In *Hoare v. Metropolitan Board* (*m*), a publican whose sign-post had stood for forty years upon a common adjoining his public-house was held entitled to replace it when it was blown down. In *Good-*

(*h*) Cf. *Nicholas v. Chamberlain*, above, p. 116 ; and see, as to the second case, *Peter v. Daniel*, 1848, 5 C. B. 568 ; 17 L. J. C. P. 177.

(*i*) 1669, 1 Saund. 321.

(*j*) This is cited as clear law by Lord Coke in *Liford's Case*, 1738, 11 Rep. 42 a.

(*k*) *Jones v. Pritchard*, 1908, 1 Ch. 638 ; 77 L. J. Ch. 405. See *Hodgson v. Field*, 1806, 7 East, 613 ; 8 R. R. 701. Compare *Beeston v. Weate*, 1856, 5 E. & B. 986 ; 25 L. J. Q. B. 115 ; 103

R. R. 835, where A. (a non-riparian owner) acquired a prescriptive right to go on the land of B. (an adjoining riparian owner) to turn the water from a natural stream into an artificial watercourse which passed from the stream across B.'s land to A.'s land, and to repair such watercourse.

(*l*) *Newcome v. Coulson*, 1877, 5 Ch. D. 143 ; 46 L. J. Ch. 459. See *Gerrard v. Cooke*, 1806, 2 Bos. & Pull. N. R. 115.

(*m*) 1874, L. R. 9 Q. B. 296 ; 43 L. J. M. C. 65.

hart v. Hyett (n) the plaintiff, being entitled to a supply of water through pipes laid in the defendant's land, obtained an injunction restraining the defendant from building so as to interfere with the plaintiff's access to the pipes for purposes of repair. In another case the servient owner was held entitled to construct on his land works which rendered the dominant owner's access to his drain for purposes of repair less easy, but not impossible (o).

Repairs:
position of
dominant
owner.

In the earlier case of *Taylor v. Whitehead* (p) it was said by Lord Mansfield that by the common law of England "he that hath the use of anything ought to repair it." But this, it was said by Coleridge, J., is not an obligation to which the grantee of a right of way is subject. It is no more than this, that if he wants the way to be repaired he must repair it himself (q). It seems, however, that a liability to contribute to repairs may be attached to the enjoyment of an easement by the terms of the grant (r).

Prima facie
no obligation
on dominant
owner to
repair.

The cases where an easement includes the laying on another man's land of some artificial work to be used for the purposes of and belonging to the dominant owner have been dealt with specially by the Courts. Thus, in referring to these cases, it was said by Parker, J., that there is a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to any want of repair. If the easement be to take water in pipes across another man's land, and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. But even in this case the dominant owner cannot, strictly speaking, be said to be under any duty to repair. The true position is that he cannot, under the circumstances mentioned, plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being fairly or properly exercised (s).

Easement
enjoyed by
some
artificial
work:
obligation of
dominant
owner to
prevent
damage.

In several earlier cases it had been decided that if a man carries water by means of pipes through his neighbour's land he must keep those pipes in repair (t). Similarly a landowner who makes for his own

(n) 1883, 25 Ch. D. 182; 53 L. J. Ch. 219.

(o) *Birkenhead v. L. & N. W. R.*, 1885, 15 Q. B. D. 572; 55 L. J. Q. B. 48.

(p) 1781, 2 Doug. 749.

(q) *Duncan v. Louch*, 1845, 6 Q. B. 909; 14 L. J. Q. B. 185; 66 R. R. 592.

(r) See 6 Q. B. 908, 912.

(s) *Jones v. Pritchard*, 1908, 1 Ch. 638; 77 L. J. Ch. 405. Compare the judgment of Lord Romilly in *Ingram v. Morecraft*, 1863, 33 Beav. 52.

(t) *Egremont v. Pulman*, 1829, Mood. & M. 404; *Humphries v. Cousins*, 1877, 2 C. P. D. 239; 46 L. J. C. P. 438; *Hoare*

Repairs :
position of
dominant
owner.

purposes an artificial watercourse which passes over his neighbour's land is bound to keep the watercourse in such repair as will prevent the water from breaking out ; and will be liable for damage from the want of such repair, even where the servient owner may have acquired a right to the use of the water with the consequent right to effect the repairs himself (*u*).

Civil law.

By the civil law it was expressly provided that the dominant owner was liable to keep in repair his artificial works (*x*). In the case of natural servitudes no action lay for any change produced by causes entirely independent of the act of man, and each party was in general compelled to submit to the inconvenience or entitled to the benefit of all changes effected by the hand of nature in the condition of his tenement. If, however, a reparation could be effected which in no respect deteriorated the condition of the dominant, while it rendered less onerous that of the servient owner, it seems that the latter might himself perform the necessary repairs ; thus, if by accretions of mud or other natural causes the flow of the stream became irregular, and consequently injurious to the servient owner, he might enter on the adjoining land and cleanse the stream, provided he thereby did no injury to his neighbour (*y*).

v. Dickinson, 1730, 2 Ld. Raym. 1568 ; *Alston v. Grant*, 1854, 3 E. & B. 128 ; 23 L. J. Q. B. 163 ; 97 R. R. 404. See *Nathan v. Rouse*, 1905, 1 K. B. 527 ; 74 L. J. K. B. 285 (a case of the right to contribution under the Public Health (London) Act, 1891).

(*u*) *Buckley v. B.*, 1898, 2 Q. B. 608 ; 67 L. J. Q. B. 953. Compare *Beeston v. Weate*, 1856, 5 E. & B. 986 ; 25 L. J. Q. B. 115 ; 103 R. R. 835. Distinguish the case where the watercourse was not made by the original landowner for his own purposes : *Whitmores v. Stanford*, 1909, 1 Ch. 427 ; 78 L. J. Ch. 144.

(*x*) *Aggerem*, qui in fundo vicini erat, vis aquæ deiecit : per quod effectum est, ut aqua pluvia mihi noceret. Varus ait, si naturalis agger fuit, non posse me vicinum cogere "aquæ pluviae arcendæ" actione, ut eum reponat vel reponi sinat. Idemque putat, et si manufactus fuit neque memoria ejus exstaret—quod si exstet, putat "aquæ pluviae arcendæ" actione eum teneri. Labeo autem, si manufactus sit agger, etiamsi memoria ejus non exstat, agi posse, ut reponatur : nam hæc actione neminem cogi posse, ut vicino prosit, sed ne noceat, aut interpellet facientem quod jure facere possit. Quamquam tamen deficiat

"aquæ pluviae arcendæ" actio : attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesse potest, ipsi vero non nociturus est ; hæc æquitas suggerit, etsi jure deficiamus.—Dig. 39, 3, 2, § 5, de aq. et aq. pl. arc.

Trebatius existimat, si de eo opere agatur, quod manufactum sit, omnimodo restituendum id esse ab eo, cum quo agitur : si vero vi fluminis agger deletus sit, aut glareæ injecta, aut fossa limo repleta, tunc patientiam duntaxat præstandam.—Ib. 11, § 6.

(*y*) Apud Namusam relatum est,—si aqua fluens iter suum stercore obstruxerit, et ex restagnatione superiori agro noceat, posse cum inferiori agi, "ut sinat purgari" ; hanc enim actionem non tantum de operibus esse utilem manufactis, verum etiam in omnibus, quæ non secundum voluntatem sint. Labeo contra Namusam probat ; ait enim naturam agri ipsam a se mutari posse : et ideo, cum per se natura agri fuerit mutata, æquo animo unumquemque ferre debere, sive melior sive deterior ejus conditio facta sit. Idcirco, et si terræ motu, aut tempestatis magnitudine, soli causa mutata sit : neminem cogi posse, ut sinat in pris-

C. Right to Deviate.

First, as to private ways where the servient owner is not bound to keep the way in repair. In this case the rule is that as it must be the fault of the dominant owner if the way be impassable he can have no right to leave the ordinary track on account of any obstruction or want of repair for which the servient owner is not answerable (z).

Right to deviate.
Private ways.
Servient owner not bound to repair.

If, however, the servient owner places across the way an obstruction not allowing of easy removal, there, for the purpose of connecting the two parts of his way, the dominant owner may, on each side of the obstruction, go round over the servient owner's land without trespass (a). And this rule applies where the servient owner is a party to an obstruction by others (b). The right, however, continues only so long as the obstruction remains (c), and must be exercised in a reasonable manner (d).

Secondly, as to private ways which the servient owner is bound by prescription or otherwise to keep in repair. In this case it seems that a failure to repair on the part of the servient owner would amount to an actual obstruction by him and give rise to the above-mentioned right of deviation (e).

Servient owner bound to repair.

Comyns' Digest (f) contains the following statement: "If a man be bound by prescription to the repair of a way, he need not keep it in better repair than it always was. But if it be impassable, a passenger may break the fence, and go *extra viam* as much as is necessary to avoid the bad way." Upon reference to the original authority (g) it appears that the grantor of the way was bound to keep it in repair. The misapprehension of the authority cited in Comyns' Digest (h) appears to have originated in the mistake of Blackstone, who lays it down (2 Com. 36) that in public, as well as in private, ways a man who had the right of way might, if it were out of repair, go over the adjoining land. The cases cited by Blackstone in support of this position appear to be those of public ways only. As regards public ways, however, the question whether the public have always the right to deviate from a highway, whether the

Public ways.

tinam loci conditionem redigi. Sed nos etiam in hunc casum aequitatem admittimus.—Ib. 2. § 6.

(z) *Taylor v. Whitehead*, 1781, 2 Doug. 745; *Bullard v. Harrison*, 1815, 4 M. & S. 387; 16 R. R. 493. See *Duncombe's Case*, 1634, 1 Cro. Car. 366; *Robertson v. Ganille*, 1847, 16 M. & W. 289; 16 L. J. Ex. 156.

(a) *Selby v. Nettlefold*, 1873, 9 Ch. 114; 43 L. J. Ch. 359.

(b) *Stacey v. Sherrin*, 1913, 29

T. L. R. 555.

(c) *Selby v. Nettlefold*, sup.

(d) *Hawkins v. Carbines*, 1857, 27

L. J. Ex. 44.

(e) See *Taylor v. Whitehead*, sup.

(f) Com. Dig. Chimin, D. 6.

(g) Cited in *Henn's Case*, 1633, Sir W. Jones, 296.

(h) See *Bullard v. Harrison*, 1815, 4 M. & S. 390; 16 R. R. 493, preface, vi.

Right to
deviate.

obstruction arises from the acts of an adjoining owner or the action of the elements, seems to be doubtful (*i*).

The distinction as to deviation between public and private ways was recognized by the civil law: if the public highway were impassable a traveller might pass along the land adjoining; but no such right appears to have existed in respect of private ways (*k*).

(*i*) See, on the one hand, *Taylor v. Whitehead*, sup.; *Bullard v. Harrison*, sup.; *R. v. New Forest*, 1892, 56 J. P. 517; and on the other hand, *Arnold v. Holbrook*, 1873, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80; *R. v. Oldreave*, 1868, 52 J. P. 271.

(*k*) Cum via publica vel fluminis impetu vel ruinâ amissa est, vicinus proximus viam præstare debet.—Dig. 8, 6, 14, § 1, quemad. serv. amit.

Si locus, per quem via, aut iter, aut actus debebatur, impetu fluminis occu-

patus esset, et intrâ tempus, quod ad amittendam servitutem sufficit, alluvione factâ, restitutus est, servitus quoque in pristinum statum restituitur. Quod si id tempus præterierit, ut servitus amittatur, renovare eam cogendus est.—Ib.

Per agrum quidem alienum, qui servitutem non debet, ire vel agere vicino minimè licet; uti autem viâ publicâ nemo recte prohibetur.—Cod. 3, 34, 11, de serv. et aquâ.

CHAPTER II.

SECONDARY EASEMENTS.

IT has been already seen that certain easements are implied by law as incident to a grant, since without them the thing granted could not be fully enjoyed (*a*); in the same manner the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one.

Secondary easements implied by law.

Bracton speaks of easements in general as appurtenances of "tenements," and of these secondary easements as appurtenances of the former:—"Omnia jura prænotata et omnes servitutes sunt de pertinentiis tenementorum, et pertinent a tenemento ad tenementa; et habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi et ad pasturam pertinet via et liber ingressus et egressus. Et eodem modo ad jus fodiendi, falcandi, et secandi, hauriendi, potandi, piscandi, venandi, et hujusmodi, liber accessus et recessus, scilicet via, iter, et actus, ratione diversorum usuum ut supra. Item ad jus aquæ ducendæ pertinet purgatio. Item ad iter, secundum quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine aliâ servitute, pertinet reffectio, sicut ad aquæ ductum pertinet purgatio" (*b*). This, like the general case of implied easements, is comprehended under the maxim "Lex est cuicunque aliquis quid concedit, concedere videtur et id sine quo res esse non potuit" (*c*).

Bracton.

Thus, too, in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment (*d*).

In doing the works which are necessary for the enjoyment of the easement, the owner of the dominant tenement may do everything that is reasonably necessary for the full and free exercise of his right (*e*).

Extent of dominant owner's right.

(*a*) See ante, "Easements of Necessity."

(*b*) Bracton, lib. 4, f. 232 a.

(*c*) *Liford's Case*, 1738, 11 Rep. 52 a. See above, p. 431.

(*d*) Qui habet haustum, iter quoque habere videtur ad hauriendum et (ut ait Neratius, lib. 3, *membranarum*) sive ei jus hauriendi, et adeundi cessum sit,

utrumque habebit: sive tantum hauriendi, inesse et aditum, sive tantum adeundi ad fontem, inesse et haustum. Hæc de haustu et fonte privato.—Dig., 3, 3, § 3, de serv. præd. rust.

(*e*) *Jones v. Pritchard*, 1908, 1 Ch. 638; 77 L. J. Ch. 405. As to the words "reasonably necessary," see *Cope v. Sharpe*, 1911, 2 K. B. 842; 80 L. J.

Extent of
dominant
owner's right.
Senhouse v.
Christian.

Thus, it has been held that the grant of a right of way, with liberty to make and lay causeways, and to use and enjoy the same, with wains, carts, waggons, and other carriages, and to carry coals, authorized the grantee to lay a framed waggon-way (*f*). "The question is," said Ashhurst, J., in his judgment in that case, "whether, under this general grant for the purpose of carrying coals among other things, he has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals, it being in the contemplation of the parties at the time of making the grant" (*g*).

Gerrard v.
Cooke.

Thus, too, in *Gerrard v. Cooke* (*h*), where the grant was made of a piece of land, as a foot or causeway, with "all other liberties, powers, and authorities incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage," it was held that the grantee had a right to put a piece of flagstone upon a part of the land in front of a door opened by him from his house, it being proved that it was usual to put down such flagstones before doorways, and that the doorway in question could not have been so conveniently used without it (*i*).

Finlinson v.
Porter.

In *Finlinson v. Porter* (*k*) the grantee of an easement of a drain, with a right to enter and repair it, was held entitled to deepen it in order to adapt it to the sewer as altered by the local authority.

"If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way" (*l*).

K. B. 1008; 1912, 1 K. B. 504; 81 L. J. K. B. 346. Compare the Irish decision that the owner of a profit à prendre gets with it a right to everything necessary to its enjoyment: *Cabbedell v. Kilkelly*, 1905, 1 I. R. 443.

(*f*) *Senhouse v. Christian*, 1787, 1 T. R. 560; 1 R. R. 300. Cf. *Bishop v. North*, 1843, 12 L. J. (N. S.) Exch. 362; 63 R. R. 648.

(*g*) In an early case, 6 Edw. 4, it was held that a man was not justified to enter for the purpose of repairing unless the way was altogether impassable; it was not sufficient that it could not be used so conveniently as before; and on the inconvenience to the party entitled

to the way being urged, and that he would be without remedy, Suit, J., said: "If he went that way before in his shoes, let him now pluck on his boots" (cited 2 Doug. 747, 4th ed.). This, however, is clearly not law.

(*h*) 1806, 2 Bos. & P. N. R. 109.

(*i*) *Duncombe v. Randall*, 1628, Hetley, 32 or 34; *Brown v. Best*, 1747, 1 Wilson, 174; *Weld v. Hornby*, 1806, 7 East, 195; 8 R. R. 608; *Hodgson v. Field*, 1806, 7 East, 613; 8 R. R. 701.

(*k*) 1875, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56. Dist. *Taylor v. St. Helen's*, 1877, 6 Ch. D. 264; 46 L. J. Ch. 857.

(*l*) Per Jessel, M.R., in *Newcomen v.*

In *Knox v. Sansom* (m) it was held upon the evidence that a right of way for carriages and carts included the right of turning. Extent of dominant owner's right.

According to *Dand v. Kingscote* (n), the grantee of a mine is entitled to a wayleave "reasonably sufficient" to enable the grantee to get the coals.

By the civil law the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude, so long as he did not impose any additional burden upon the servient heritage (o). And this right extended to the justification of any trespass committed by him and his workmen on any part of the servient heritage (*loca quæ non servient*) in the execution of such works as were necessary for the enjoyment of the servitude (p). And the owner of the servient tenement was prevented from doing on the land, not only anything immediately injurious to the easement, but anything which, by obstructing the incidental right of repair, would indirectly be productive of the same consequence: in addition to which, in the case of a watercourse, the servient tenement was expressly subjected to the obligation of leaving a passage for the nearest access of the owner of the dominant tenement and his workmen, and also a sufficient space on each side of the stream for depositing the necessary materials (q). Civil law.

So, too, if the easement were a right of way, which could not be enjoyed without the construction of works (*opere facto*), the grant carried with it a right to dig and lay materials upon the soil (r); or if the position of the servient land were higher than the house to

Coulson, 1877, 5 Ch. D. at p. 143; 46 L. J. Ch. 459. Cf. *Abson v. Fenton*, 1823, 1 B. & C. 195; 1 L. J. K. B. 94.

(m) 1877, 25 W. R. 864.

(n) 1840, 6 M. & W. 198; 9 L. J. (N. S.) Ex. 279; 55 R. R. 560. Cf. *Batten Pooll v. Kennedy*, 1907, 1 Ch. 256; 76 L. J. Ch. 162.

(o) Quintus Mucius scribit, cum iter aquæ vel quodiæniæ, vel æstivæ, vel quæ intervalla longiora habeat, per alienum fundum erit, (licere) fistulam suam vel fictilem, vel cujuslibet generis in vivo ponere, quæ aquam latius exprimeret; et quod vellet in vivo facere licere, dum ne domino prædii aquagium deterius faceret.—Dig. 8, 3, 15, de serv. præd. rust.

(p) Sed et depressurum vel adlevaturum rivum, per quem aquam jure duci potestatem habes; nisi si, ne id faceres, cautum sit.—Dig. 8, 4, 11, com. præd.

(q) Refectionis gratiâ, accedendi ad ea loca, quæ non serviant, facultas tri-

buta est his, quibus servitus debetur: qua tamen accedere eis sit necesse: nisi in cessione servitutis nominatim præfinitum sit, quâ accederetur; et ideo nec secundum rivum, nec suprà eum, si forte sub terrâ aqua ducatur, locum religiosum dominus soli facere potest, ne servitus intereat; et id verum est.—Ib.

Si prope tuum fundum jus est mihi aquam rivo ducere, tacita hæc jure sequuntur—ut relicere mihi rivum liceat: ut adire, quâ proxime possem ad reficiendum eum ego, fabrique mei: item, ut spatium relinquat mihi dominus fundi, quo, dextrâ et sinistrâ, ad rivum adeam, et quo terram, limum, lapidem, arenam, calcem jacere possim.—Ib., § 1.

(r) Si iter legatum sit, qua, nisi opere facto, iri non possit, licere foliando, substruendo, iter facere, Proculus ait.—Dig. 8, 1, 10, de serv.

Extent of
dominant
owner's right.

which the right was granted, and no level passage existed across the land, to cut steps or slopes in the soil for the more convenient use of the easement, provided no greater injury were committed than was necessary for the enjoyment of the right of way (s).

No unneces-
sary damage
to be done to
servient
tenement.

But in doing these works for the enjoyment of an easement the owner of the dominant tenement must not do anything to alter the accustomed mode of enjoyment in such a manner as to impose a greater burden upon the servient tenement.

"I agree with the proposition," said Rooke, J., in the case of *Gerrard v. Cooke*, "that the grantee may use the way in the manner which is most convenient to himself, if he does not thereby produce inconvenience to the grantor"; a position with which Chambre, J., agreed, observing, "if any injury had been sustained by the grantor, it might make a difference."

Bracton.

"Reficere autem est," says Bracton, "id quod corruptum est in pristinum statum reformare. Ei vero permittitur reficere et purgare rivum qui jus habet servitutis, et qui aquæ ducendæ causâ id fecit. In pristinum statum dico, quia si quis rivum deprimit vel attollit, dilatat vel extendit, operit apertum vel quâ per excessum delinquit" (t).

"Sed non potest quis sub specie refectionis deterius aliquid facere, nec altius nec latius nec humilius nec longius aliquid facere" (u).

Civil law.

So also by the civil law, a party entitled to a right of way could not compel the owner of the land to allow him to repair it with stone (silice), unless there was an express stipulation to that effect. "Sed de refectione viæ et interdicto uti possumus, quod de itinere actuque reficiendo competit; non tamen, si silice quis sternere velit: nisi nominatim id convenit" (x).

In like manner, a party having the right of receiving water through a pipe could not substitute for it a stone conduit. "Rectè placuit, non aliàs per lapidem aquam duci posse, nisi hoc in servitute constituendâ comprehensum sit; non enim consuetudinis est, ut qui aquam habeat, per lapidem statum ducat: illa autem, quæ ferè in consuetudine esse solent, ut per fistulas aqua ducatur, etiam si nihil sit comprehensum in servitute constituendâ, fieri possunt; ita tamen, ut nullum damnum domino fundi ex his detur" (y). But

(s) Si domo mea altior area tua esset, tuque mihi per aream tuam in domum meam ire agere cessisti, nec ex plano aditus ad domum meam per aream tuam esset, vel gradus, vel olivos, propius januam meam jure facere possum; dum ne quid ultra, quam quod necesse est, itineris causâ demo-

liar.—Dig. 8, 2, 20, § 1, de serv. præd. urb.

(t) Lib. 4, ff. 233 a. Dist. *Finlinson v. Porter*, above, p. 438.

(u) Lib. 4, ff. 234 b.

(x) Dig. 8, 5, 4, § 5, si serv. vind.

(y) Dig. 39, 3, 17, § 1, De aquâ et aq. pl. arc.

he had a right even without any express stipulation to repair it in the ordinary way, provided he thereby did no unnecessary harm to the owner of the land.

In entering upon the neighbouring soil for the purpose of doing these necessary works the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labours might have caused to the servient tenement (z). This, however, must not be confounded with damage to the servient tenement naturally arising from the easement itself, as where a stream of water overflowed its banks in consequence of rain or the rising of a new spring in it (a).

As, however, these ancillary servitudes were only conferred for the full enjoyment of the primary servitude, they ceased upon its extinction (b).

As a general rule, the right of repair extended no farther than to restore the servitude to its original condition (*ad pristinam formam* (c); though such restored servitude needed not to be specifically in the same state: thus a bridge might be built, if the way were otherwise impassable (d).

It might be provided by express stipulation that the owner of the dominant tenement should not have any right to repair, or only to a certain extent (e).

The incidents or secondary easements discussed in this chapter form, in most cases, one entire right with the principal easement (f).

No unnecessary damage to be done to servient tenement.

Dominant owner bound to repair damage done.

Restoration of servitude to its original condition.

Rights of dominant owner may be affected by express stipulation.

(z) Si fistulæ per quas aquam ducas, ædibus meis applicatæ, damnum mihi dent, in factum actio mihi competet; sed et damni infecti stipulari à te potero.—Dig. 3, 2, 18, de serv. præd. urb.

(a) Servitus naturaliter, non manu-facto, lædere potest fundum servientem; quemadmodum si imbri crescat aqua in rivo, aut ex agris in eum confluat, aut aquæ fons secundum rivum, vel in eo ipso inventus postea fuerit.—Dig. 8, 3, 20, § 1, de serv. præd. rust.

(b) Labeo ait: si is, qui haustum habet, per tempus, quo servitus amittitur, ierit ad fontem, nec aquam hauserit, iter quoque eum amississe.—Dig. 8, 6, 17, quemad. serv. amit.

(c) Reficere sic accipimus, ad pristinam formam iter et actum reducere; hoc est, ne quis dilatet, aut producat, aut deprimat, aut exaggeret—et aliud est enim reficere, longe aliud facere.—Dig. 43, 19, 3, § 15, de itinere.

(d) Apud Labeonem queritur—si pontem quis novum velit facere viæ muniendæ causâ: an ei permittatur? et ait permittendum, quasi pars sit refectiōnis hujusmodi munitio. Et ego puto veram Labeonis sententiam, si modo sine hoc commeari non possit.—Ib. § 16. Compare the modern decision as to the right to rebuild a bridge over which a highway passed: *Campbell-Davys v. Lloyd*, 1901, 2 Ch. 518; 70 L. J. Ch. 714.

(e) Fieri autem potest, ut qui jus eundi habeat et agendi, reficiendi jus non habeat; quia in servitute constituendâ cautum sit, ne ei reficiendi jus sit; aut sic, ut si velit reficere, usque ad certum modum reficiendi jus sit.—Ib. § 14.

(f) *Peter v. Daniel*, 1848, 5 C. B. 568; 17 L. J. C. P. 177; *Beeston v. Weate*, 1856, 5 E. & B. 986; 25 L. J. Q. B. 115; 103 R. R. 835.

CHAPTER III.

EXTENT AND MODE OF ENJOYMENT.

Dominant owner cannot increase burden on servient tenement.

As every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction beyond its legitimate limit (*a*). In the case of an express grant of the easement the limit depends on the words used (*b*). The easement granted may be such as altogether to exclude the owner of the servient tenement from participation in the enjoyment of the easement (*c*). Supposing no express grant to exist, the right must be limited and defined by the user proved (*d*).

This doctrine has been laid down in the House of Lords in the following way. It would be contrary, it has been said, to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement (*e*).

Rule applied in case of rights of way.

The doctrine has been applied in the case of different easements. Thus, in the case of rights of way, it has been seen that the Courts accept the principle that the grantee of a right of way must not substantially increase the burden of the easement (*f*).

In case of rights of light.

Again, in the case of the easement of light the dominant owner may obtain increase of light by altering his mode of framing and glazing (*g*). But the dominant tenement, having ancient windows

(*a*) E.g., as to light (*Ankersen v. Connelly*, 1907, 1 Ch. 678).

(*b*) See, for instance, in the case of an express grant of a watercourse, the judgment of Jessel, M.R., in *Taylor v. St. Helen's*, 1877, 6 Ch. D. 271; 46 L. J. Ch. 857; and in the case of grants of rights of way, the cases quoted ante, p. 326.

(*c*) See *Lee v. Stevenson*, 1858, E. B. & E. 512; 27 L. J. Q. B. 263; 113 R. R. 752 (grant of exclusive use of drain); *Southport v. Ormskirk*, 1894, 1 Q. B. 201; 63 L. J. Q. B. 250; *Bryan v. Whistler*, 1828, 8 B. & C. 288; 6 L. J. K. B. 302; 32 R. R. 389 (grant of exclusive use of vault for burial). Distinguish the cases as to the exclusive use of land quoted ante, p. 21; and see

Rhodes v. Bullard, 1806, 7 East, 116 (a right in the nature of an easement determinable on removal of subject-matter).

(*d*) *Milner v. G. N. & City R.*, 1907, 1 Ch. 220; 75 L. J. Ch. 807; 76 L. J. Ch. 99; *A.-G. v. G. N. R.*, 1909, 1 Ch. 775; 78 L. J. Ch. 577.

(*e*) Per Lord Davey, *Colls v. Home Stores*, 1904, A. C. 202; 73 L. J. Ch. 484. See the modern statements of the same doctrine in *Harris v. Flower*, 1905, 74 L. J. Ch. 132; *Milner v. G. N. & City R.*, 1907, 1 Ch. 226; 75 L. J. Ch. 807; 76 L. J. Ch. 99.

(*f*) See ante, p. 333.

(*g*) *Turner v. Spooner*, 1861, 1 Dr. & Sm. 467.

overlooking the servient tenement, may not be so altered as to make the unobstructed access of light to the ancient windows more necessary to the enjoyment of the dominant tenement than they were before the alteration, so as to render actionable an obstruction which would not, before the alteration, have been an illegal interference with the right (*h*).

Increase of
burden on
servient
tenement.

So, again, in the case of water rights, a mill-owner who has the right of diverting water cannot alter his sluice so as to divert more water (*i*). Nor can a riparian owner who has acquired a prescriptive right to pollute water increase the pollution to the prejudice of others (*k*). Nor can a riparian owner by accumulating water increase the burden of the lower riparian owner (*l*). But where the burden is not increased trifling variations can be made in the user of the easement. Thus, where a right existed to supply cattle-sheds by a watercourse the dominant owner could erect cottages in the place of the cattle-sheds (*m*).

In case of
rights of
water.

On the construction of grants, it has been held that a grantee of a watercourse could not enlarge the channel (*n*). A grant of the running of water, &c., from land did not authorize the discharge of a sewage effluent (*o*), or of the refuse of tan pits (*p*).

In *Wood v. Saunders* (*q*) the plaintiff, being entitled by express grant to a mansion with the free passage of water and soil to a cesspool on the defendant's land, enlarged the mansion so as to increase the amount of soil. The defendant having stopped the drains leading to the cesspool, the case came before Hall, V.-C., who restrained the defendant from preventing the free use and passage of water and soil in and to the cesspool, but added that his order was only to protect the plaintiff in the reasonable use of such cesspool to the extent to which the same was used prior to the date of the grant. On appeal the decree was varied, the plaintiff submitting to be restrained from allowing the drainage from the additional buildings

(*h*) *Ankersen v. Connelly*, 1906, 2 Ch. 544; 1907, 1 Ch. 678; 76 L. J. Ch. 402. See *Bailey v. Holborn*, 1914, 1 Ch. 598; 83 L. J. Ch. 515.

(*i*) *Bealey v. Shaw*, 1805, 6 East, 207; 8 R. R. 466.

(*k*) *Crossley v. Lightowler*, 1867, 2 Ch. 478; 36 L. J. Ch. 584; *Macintyre v. Macgavin*, 1893, A. C. 268.

(*l*) *Frechette v. La Compagnie*, 1883, 9 App. Cas. 170; 53 L. J. P. C. 20.

(*m*) *Watts v. Kelson*, 1870, 6 Ch. 166; 40 L. J. Ch. 126. See also *Saunders v. Newman*, 1818, 1 B. & Ald. 258; 19 R. R. 312; *Greenslade v.*

Halliday, 1830, 6 Bing. 379; 8 L. J. C. P. 124; 53 R. R. 241.

(*n*) *Taylor v. St. Helen's*, 1877, 6 Ch. 264; 46 L. J. Ch. 857.

(*o*) *Phillimore v. Watford*, 1913, 2 Ch. 434; 82 L. J. Ch. 514.

(*p*) *Chadwick v. Marsden*, 1867, L. R. 2 Exch. 285; 36 L. J. Ex. 177.

(*q*) 1875, 10 Ch. 582; 44 L. J. Ch. 514. See *New Windsor v. Stovell*, 1884, 27 Ch. D. 665; 54 L. J. Ch. 113; *Metropolitan Board v. L. & N. W. R.*, 1881, 17 Ch. D. 246; 50 L. J. Ch. 409.

Increase of
burden on
servient
tenement.

erected by him to go into the cesspool, and the defendant being restrained from preventing the free passage of water and soil into the cesspool. The Court apparently treated the drainage from the additional buildings as severable from the drainage from the original building; and thus the case became a question of "excess" rather than of construction.

Civil law.

By the civil law a party entitled to a flow of water, for irrigation or other purposes, was not allowed to impart the use of it to his neighbours (*r*); nor, as it appears, even if he himself purchased the adjoining lands, would he be entitled to take a larger quantity of water than before for the use of his estate (*s*); for in determining the amount of a servitude regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement *tigni immittendi* could not increase the number of beams which his neighbour was bound to support, and might be compelled to remove any additional ones inserted by him (*t*).

Pulling down
for purpose
of repair.

The pulling down of a house for the purpose of repair does not, by the law of England, even when construed most strictly, cause the loss of any easement attached to it, if it be accompanied by an intention, acted upon within a reasonable time, of rebuilding it (*u*).

Civil law.

By the civil law the mere destruction either of the dominant or servient tenement extinguished a servitude, though it was held to revive if the house were rebuilt on the same site and of the same dimensions as before (*x*).

Alteration in
mode of
enjoyment.

A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill, or the like (*y*), whereby no injury

(*r*) *Ex meo aquæ ductu, Labeo scribit, cuilibet posse me vicino commodare; Proculus contra, ut ne in meam partem fundi aliam, quam ad quam servitus adquisita sit, uti ea possit. Proculi sententia verior est.*—Dig. 8, 3, 24, de serv. præd. rust.

(*s*) *Non modus prædiorum, sed servitus aquæ ducendæ terminum facit.*—Cod. 3, 34, 12, de serv. et aqua.

(*t*) *Si, cum meus proprius esset paries, passus sim (te) immittere tigna, quæ antea habueris, si nova velis immittere, prohiberi à me potes; imo etiam agere tecum potero, ut ea quæ nova immiseris, tollas.*—Dig. 8, 5, 14, si serv. vind.

(*u*) *Luttrell's Case*, 1738, 4 Rep. 86. And this intention will be presumed, no evidence of the intention being necessary (*Smith v. Baxter*, 1900, 2 Ch. 138). The reason is obvious, viz., that it is

incidental to all houses to be repaired and at some time to be rebuilt, and the right when acquired is acquired for the tenement with such incidents. If this were not so, no prescriptive right could be acquired in respect of a mesuage or any artificial structure. See also *Moore v. Rawson*, post, "Extinguishment of Easements."

(*x*) *Si sublatum sit ædificium ex quo stillicidium cadit, ut eadem specie et qualitate reponatur, utilitas exigit, ut idem intelligatur: nam alioquin, si quid strictius interpretetur, aliud est, quod sequenti loco ponitur; et ideo, sublato ædificio, usufructus interit, quamvis area pars est ædificii.*—Dig. 8, 2, 20, § 2, de serv. præd. urb.

(*y*) *Luttrell's Case*, 1738, 4 Rep. 86; *Bacendale v. McMurray*, 1867, 2 Ch. 790.

is caused to the servient heritage, or a trifling alteration in the course of a watercourse (z), does not destroy the right.

Increase of
burden on
servient
tenement.
Civil law.

By the civil law the owner of the dominant tenement might make any alteration in the mode of enjoying his servitude, provided he thereby imposed no additional burden on the servient heritage; he might make the condition of his neighbour better, but not worse (a).

This, however, must be taken with some qualification when applied to the case of natural rights. The owner of land in which a spring took its rise, or upon which rain fell, was allowed, for the necessary purposes of cultivation, a reasonable degree of liberty in changing the course of the water running to his neighbour's land, though he might thereby impose a greater burden.

"It seldom happens," says Pardessus (b), "that running water, which takes its rise on an estate, or even the rain water which falls upon it, is absorbed there and escapes without any apparent issue. Some mode of discharge is then necessary; and it is in the obligation to suffer this discharge that, by the Code (c), consists the subjection of the inferior heritage towards those whose lands are more elevated, to receive the waters which flow from them naturally. Even if this discharge should be prejudicial to the plantations of the inferior heritage, or should prevent its cultivation by bringing down upon it stones and sand, no action could be maintained for the damage so done. No one is responsible for the effects of nature (d). The case even cannot be excepted where for more than thirty years (e), whether from causes purely natural, such as the scarcity of water, whether from the sole act of the proprietor, as, for example, if he had kept the water, or in any other manner which offered a large service for evaporation, the spring should have had no issue upon the inferior heritage. As such rights as are imposed by the general law, and the nature of things, are not lost by mere non-user, whatever time may have elapsed."

Pardessus.

"The same article adds, that 'this obligation applies only to the waters which flow naturally without any act of man'; those which come either from springs or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. He who, for whatsoever use it may be, shall employ in his house, or on

(z) *Hall v. Swift*, 1838, 6 Scott, 167; 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728.

(a) Dig. 8, 2, 20, § 5, de serv. præd. urb. post.

(b) *Traité des Servitudes*, § 82 (7th ed. 113).

(c) Code Civil, art. 640.

(d) Quod si naturâ aqua noceret eâ actione non continentur.—Dig. 39, 3, 1, § 1, de aq. et aq. pl. arc.

(e) That is to say, the period of prescription by the French law.

Increase of
burden on
servient
tenement.
Pardessus.

his heritage, water which he drew from a well, reservoir, &c., cannot discharge it (*faire couler*) upon the inferior heritage without the permission of the proprietor. A man who devotes his heritage to a species of cultivation requiring frequent irrigation, ought to make at the extremities of his land ditches to receive the surplus water which, without this precaution, might percolate to his neighbour's land. The latter might with reason contend that such a process is not natural, and would not have taken place but for the act of man (*f*). Conformably to this principle, the Code (*g*) does not permit the discharge of water from a roof or the neighbouring land, even though it might happen that, were the site of the building unoccupied (*vague*), the rain which fell there would by a natural servitude flow into the neighbouring land.

"It would appear, however, to be a false application of these principles to consider as the act of man the fall of water from a fountain newly opened, even though the opening has been caused by the labour of the proprietor of the land. If any contest arose as to the obligation to receive the water, the question for the tribunals to decide would be—upon which heritage the water would most naturally fall.

"It is not, however, to be understood that, because the flow of water must not be caused by the act of man, therefore the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land; that he is condemned to abandon it to a perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law could not have had this intention; it prohibits only the emission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow" (*h*).

(*f*) Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet; in suo enim alii haec tenens facere licet, quatenus nihil in alienum immittat.—Dig. 8, 5, 8, § 5, si serv. vind.

(*g*) Art. 681.

(*h*) Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur; totiensque locum habet, quotiens manu facto opere agro aqua nocitura est; id est, cum quis manu fecerit, quo aliter fluere, quam naturâ solet; si forte immittendo eam aut majorem fecerit, aut citatiorem, aut

vehementiorem; aut si comprimendo redundare efficit; quod si naturâ aqua noceret, ea actione non continentur.—Dig. 39, 3, 1, § 1, de aq. et aq. pl. arc.

De eo opere, quod agri colendi causâ aratro factum sit, Quintus Mucius ait, non competere hanc actionem. Trebatius autem, non quod agri, sed quod frumenti duntaxat querendi causâ aratro factum sit, solum exceptit.—Ib. § 3.

Sed et fossas agrorum siccandorum causâ factas, Mucius ait fundi colendi causâ fieri; non tamen (oportere) corrivandæ aquæ causâ fieri; sic enim

In the American Courts questions have frequently arisen upon the conflicting claims of different owners of land adjacent to a stream, where no exclusive right has been acquired by any party.

Increase of
burden on
servient
tenement.
American
decisions.

"The proprietor of a watercourse," says Story, J., "has a right to avail himself of its momentum, as a power which may be turned to beneficial purposes, and he may make such a reasonable use of the water itself for domestic purposes, for watering cattle, or even irrigation, provided it is not unreasonably detained or essentially diminished; for although, by the case of *Weston v. Alden* (i), the right of irrigation might seem to be general and unlimited, yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature by other proprietors, through whose land a stream had been accustomed to flow, and the qualification of the right by these decisions is in accordance with the common law" (k).

The general principle governing this point is thus stated by Chancellor Kent in his learned Commentaries (l):—

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use for it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it.

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application.

"The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would

debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.—
Ib. § 4; vide etiam §§ 5—11.

(i) 7 Mass. 136.

(k) *Tyler v. Wilkinson*, 4 Mason, N. S. R. 397.

(l) 3 Kent, Com. 439.

Increase of
burden on
servient
tenement.

American
decisions.

be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned ; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water."

"All that the law requires of the party, by and over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, 'that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below.' But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned ; otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law :—'*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*'" (*m*).

Severance of
dominant
tenement.

It has been already (*n*) observed that, if a severance of the dominant tenement takes place, all its easements, which are attached to the tenement, and not to the person of the owner, will attach to the severed portions (*o*) ; if a house be divided into two distinct

(*m*) The English law on this subject has been already discussed, ante, pp. 243 et seq.

(*n*) Above, p. 86.

(*o*) *Newcomen v. Coulson*, 1877, 5 Ch. D. 141 ; 46 L. J. Ch. 459. See *Tyrringham's Case*, 1738, 4 Rep. 36 b ; *Wyat Wild's Case*, 1738, 8 Rep. 78 b ; *Harris v. Drewe*, 1831, 2 B. & Ad. 164 ; 9 L. J. K. B. 200 ; 36 R. R. 527. See

the judgment of Bayley, J., in *Codling v. Johnson*, 1829, 9 B. & C. 934 ; 8 L. J. K. B. 68 ; *Bower v. Hill*, 1835, 2 Bing. N. C. 339 ; 4 L. J. (N. S.) C. P. 153 ; 41 R. R. 636. Dist. *Midland R. Co. v. Gribble*, 1895, 2 Ch. 827 ; 64 L. J. Ch. 826, where the easement was created for the purpose of affording communication between the two tenements while in the same hands.

tenements, each of these will retain the original right to have the windows unobstructed. It is obvious, however, that, by such severance, no right is acquired to impose an additional burden on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

The civil law distinctly recognized the doctrine that the dominant tenement continued to enjoy its servitudes, notwithstanding a severance (*p*).

As it is the duty of the owner of the dominant tenement not to do any act which imposes an additional burden upon the owner of the servient tenement, so the latter must do no act which interferes with the exercise of the right already acquired, or those secondary easements which are requisite for its full and free enjoyment (*q*). If his wall be liable to an easement of support to a neighbouring house, he must not (except for the purpose of necessary repair) pull down or otherwise weaken the wall, so as to make it incapable of rendering the requisite degree of support (*r*); he must not plough up a footpath across his field (*s*), or build a wall at the end of it, so as to prevent the grantee from going beyond (*t*), or drive stakes to obstruct a watercourse flowing to a mill (*u*), even though the stream be incapable of use at the place where the obstruction is made from the want of cleansing (*v*). As regards the erection of a gate across a private way, the cases are considered post, Part VI., Chap. I.

Duty of servient owner.

“The owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed, or more difficult of enjoyment, by the owner of the dominant tenement” (*x*).

(*p*) Si stipulator decesserit pluribus hæredibus relictis, singuli solidam viam petunt.—Dig. 8, 1, 17, de serv.

Si prædium tuum mihi serviat, sive ego partis prædii tui dominus esse cœpero, sive tu mei, per partes servitus retinetur, licet ab initio per partes adquiri non poterit.—Ib. 8, § 1.

(*q*) Bracton, lib. 4, ff. 233, post.

Si totus ager itineri, aut actui servit, dominus in eo agere nihil facere potest, quo servitus impediatur, quæ ita diffusa est, ut omnes glebæ serviant.—Dig. 8, 3, 13, § 1, de serv. præd. rust.

(*r*) *Brown v. Windsor*, 1830, 1 Cr. & J. 20.

(*s*) 2 Rolle, Ab. Nusans, (t. pl. 1.

(*t*) *Phillips v. Treeby*, 1862, 8 Jur.

N. S. 711, 999; 3 Giff. 632; 133 R. R. 209.

(*u*) Rolle, ubi sup., pl. 8, 9. As to diversion, see *Northam v. Hurley*, 1853, 1 E. & B. 665; 22 L. J. Q. B. 183; 93 R. R. 329; *Whitehead v. Parks*, 1858, 2 H. & N. 870; 27 L. J. Ex. 181; 115 R. R. 754; *Kensit v. G. E. R.*, 1884, 27 Ch. D. 122; 52 L. J. Ch. 608. Cf. *Pirie v. Kintore*, 1906, A. C. 478; 75 L. J. P. C. 96.

(*v*) *Bower v. Hill*, 1835, 1 Bing. N. C. 555; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630.

(*x*) Per Parker, J., *Jones v. Pritchard*, 1908, 1 Ch. 637; 77 L. J. Ch. 405 (a case of easements affecting a party-wall).

Whether
servient
owner liable
for obstruc-
tion of ease-
ment by
trees growing
on servient
tenement.

Where trees stand on the servient tenement it may happen that the roots or branches grow so as to obstruct the exercise of an easement which exists over the tenement. In such a case the question may arise whether the servient owner should be considered to be the author of the obstruction and liable accordingly. On this question there is a deficiency of authority.

In *Hall v. Swift* (y) an action was brought for disturbing a water-course. "The only positive obstruction by the defendant was, that he had directed his servants to place turf at the embouchure of a stream for irrigating his field, the ultimate stoppage being occasioned by the roots of a tree growing upon the defendant's land, whose fibres grew into and filled up the channel." The jury found that the defendant had "obstructed the plaintiff in the enjoyment of the water"; and the Court, after consulting the judge who tried the cause, and who reported "that the facts had been fully and fairly left to the jury, and that he was satisfied with their finding," refused to disturb the verdict.

The real question appears to be whether, in contemplation of law, the damage is the result of the act of man in planting the trees, however long the time may be before they become injurious; or whether it arises solely from the act of nature. In the latter case it is clear no right of action would accrue; "actus Dei nemini facit injuriam." In the former case he would, of course, be liable. And it would appear that, in this case, he is liable—for every consequence is considered to result from an act of man, which proceeds from an act of volition on his part, and the operation of the ordinary natural causes: the growth of a tree, when planted, is no more the effect of natural causes alone than that fire should communicate from one field to another by an ordinary wind; or that a stone, when flung, should strike an object at which it is aimed.

By the civil
law he was
liable.

By the civil law the servient owner was not allowed to plant trees, or do any other act, so as to obstruct the passage of light to a window enjoying the servitude—"ne luminibus officiat" (z); and the further progress of a work already commenced might be stopped on the same grounds (a). To render a man liable to an action for the discharge of rain-water upon his neighbour's land, such water must

(y) 1838, 6 Scott, 167; 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728.

(z) Si arborem ponat, ut lumini officiat, æque dicendum erit, contra impositam servitutem eum facere—nam et arbor efficit, quo minus cœli videri

possit.—Dig. 8, 2, 17, de serv. præd. urb.

(a) Quodcumque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debeatur: opusque ei novum nunciari potest, si modo sic faciat, ut lumini noceat.—Ib. 15.

have been diverted from its natural course by some act of man (opus manufactum); and this consequence was held to ensue when the diversion was caused by planting a bed of willows (*b*).

The servient owner has likewise his rights: the dominant owner's encroachments can be justified only to the extent of his easement; as to all beyond that, his acts constitute a private nuisance for which an action may be maintained (*c*). With regard, therefore, to all artificial easements, the dominant owner is bound to keep his works in such a state, that they shall cause no inconvenience to the neighbour beyond that warranted by the easement (*d*). And if he neglects this, he brings himself within the ordinary case of a violation of the rule, "Sic utere tuo ut alienum non lædas," and is of course liable to an action. In this, as in other cases of nuisance, the servient owner has the privilege of taking the remedy into his own hands. The reformation of a nuisance, as appears from Bracton, is not confined to the case of prostration, but the party aggrieved by the nuisance arising from the want of repair of a neighbouring edifice may himself do the necessary acts, "vel relevari vel reparari si querens ad hoc sufficiat" (*e*).

Rights of servient owner.

(*b*) Sed apud Servii auctores relatum est, si quis salicta posuerit, et ob hoc aqua restagnaret, "aquæ pluvie arcendæ" agi posse, si ea aqua vicino noceret.—Dig. 39, 3, 1, § 6, de aq. et aq. pluv. arc.

(*c*) *Humphries v. Cousins*, 1877, L. R. 2 C. P. D. 239; 46 L. J. C. P. 438; *A.-G. v. Acton Local Board*, 1882, L. R. 22 Ch. D. 221; 52 L. J. Ch. 108;

Brown v. Corporation of Dunstable, 1899, 2 Ch. 378; 68 L. J. Ch. 498; cf. *Canadian Pacific R. Co. v. Parke*, 1899, A. C. 535; 68 L. J. P. C. 89. As to his remedy by obstruction, see post, Part V., Chap. II., Sect. 3.

(*d*) See the decisions on this question discussed ante, p. 433, where the civil law is also stated.

(*e*) Lib. 4, ff. 233 a.

PART V.

OF THE EXTINGUISHMENT OF EASEMENTS.



As regards the extinguishment of easements Mr. Gale wrote as follows :—" The modes by which easements may be lost correspond with those already laid down for their acquisition : 1. Corresponding to the express grant is the express renunciation ; 2. To the disposition by the owner of two tenements, the merger by the union of them ; 3. To the easement of necessity, the permission to do some act which of necessity destroys it (*a*) ; 4. And to the acquisition by prescription, abandonment by non-user." And Mr. Gale proceeded to discuss the extinguishment of easements under the heads of "express release" and "implied release."

It is proposed in the present edition to adopt a somewhat different arrangement, which will be as follows :—Easements may be extinguished—(1) By operation of law, under which head may be conveniently placed the effect upon an easement of the union of ownership (whether for absolute or partial interests) of the dominant and servient tenements ; (2) By statute ; (3) By express release ; (4) By implied release.

SECT. 1.—*Of the Extinguishment of Easements by Operation of Law. And herein of the Effect upon an Easement of the Union of Ownership (whether for absolute or partial Interests) of the Dominant and Servient Tenements.*

Extinguish-
ment of
easements by
operation
of law.

An easement may be extinguished by operation of law. Thus a way of necessity is limited by the necessity which created it, and when such necessity ceases the right of way is extinguished (*b*). Again, where an easement is created by grant for a certain period, when that period has elapsed the easement comes to an end (*c*). This principle was applied where certain rights in the nature of an

(*a*) As to the extinguishment of easements of necessity, see p. 174.

(*b*) *Holmes v. Goring*, 1824, 2 Bing. 76 ; 2 L. J. C. P. 134 ; 27 R. R. 549.

See ante, p. 174.

(*c*) *Dynevor v. Tennant*, 1886, 32 Ch. D. 384 ; 57 L. J. Ch. 1078.

easement which were claimed as arising under a lease were held to cease when the lease merged in the reversion (*d*).

Extinguishment of easements by operation of law.

In another case which is an illustration of the same doctrine, A. being owner of a house and an adjoining plot demised the house to B., a simultaneous grant to B. of the right to light over the plot being implied. A. then granted the plot to C. and later on the reversion in the house to D. Before the expiration of B.'s term D. re-entered on the house for breach of condition and claimed a continuing right to light. But the Court held that the implied grant of light was only co-extensive with the express demise of the house, and that on the re-entry D.'s right to light came to an end (*e*).

So, again, an easement will be extinguished where the purpose for which it was created has come to an end. Thus, where a statute conferred upon a company the right to take water to supply a canal, the right ceased when the canal was abandoned (*f*).

We now consider the effect upon an easement of the union of ownership (whether for absolute or partial interests) of the dominant and servient tenements.

As an easement is a charge imposed upon the servient for the advantage of the dominant tenement, when these are united in the same owner, the easement is extinguished; the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, is now merged in the general rights of property (*g*).

But in order that the easement should be entirely extinguished, it is essential that the owner of the two tenements should have an estate in fee simple in both of them of an equally perdurable nature. "Where the tenant," says Littleton, "hath as great and as high an estate in the tenements as the lord hath in the seigniori, in such case, if the lord grant such services to the tenant in fee, this shall enure by way of extinguishment. Causa patet" (*h*). Upon which Lord Coke observes (*i*): "Here Littleton intendeth not only as great and high an estate, but as perdurable also, as hath been said, for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as shall make an extin-

Extinguishment of easements by union of ownership for absolute interests.

(*d*) Ibid.

(*e*) *Beddington v. Atlee*, 1887, 35 Ch. D. 323; 56 L. J. Ch. 655.

(*f*) *National Manure Co. v. Donald*, 1859, 4 H. & N. 28; 28 L. J. Ex. 185; 118 R. R. 299.

(*g*) See the authorities laying down that a man cannot have an easement

over his own land:—*Metropolitan R. Co. v. Fowler*, 1891, 1 Q. B. 171; 67 L. J. Q. B. 518; *Kilgour v. Gaddes*, 1904, 1 K. B. 461; 73 L. J. K. B. 233; *Roe v. Siddons*, 1889, 22 Q. B. D. 236.

(*h*) S. 561.

(*i*) Co. Litt. 313 b.

Extinguishment of easements by operation of law.

guishment." In a previous section, speaking of seigniories, rents, profits à prendre, &c., he says: "They are said to be extinguished when they are gone for ever, et tunc moriuntur, and can never be revived, that is, when one man hath as high and as perdurable an estate in the one as in the other" (j).

Suspension.

Unless this be the case, the easement, of whatever species it be, is suspended only so long as the unity of ownership continues, and revives again upon the separation of the tenements. "Suspense cometh of suspendeo, and, in legal understanding, is taken when a seignior, rent, profit à prendre, &c., by reason of unity of possession of the seignior, rent, &c., and of the land out of which they issue, are not in esse for a time, et tunc dormiunt, but may be revived or awaked" (k). So strictly has this doctrine been construed that no extinguishment was held to have taken place where the king was seised of one tenement "of a pure fee simple indeterminable," jure coronæ, and of the other of an estate in fee simple, determinable on the birth of a Duke of Cornwall: *R. v. Hermitage* (l).

Extinguishment by unity.

Extent of application of doctrine.

As regards the extent of application of the doctrine that extinguishment results from the union in the same owner of absolute interests in the dominant and servient tenements, it was said by Alderson, B., that no easement of absolute necessity to the dominant tenement is extinguished by unity of ownership (m). The doctrine, however, appears to be applicable to rights in the nature of easements, e.g., the right to have a fence repaired (n). It is also applicable to various sorts of easements. Thus, where the absolute owner of Blackacre, who has a right of way over Whiteacre, purchases an absolute interest in Whiteacre, the right of way is extinguished by the unity of ownership (o). So as regards prescriptive rights in water, if the same person becomes absolute owner of the land from which a stream of water flows and also of the land into

(j) Co. Litt. 313 a.

(k) Ibid.

(l) 1693, Carthew, 239. See also *James v. Plant*, 1836, 4 A. & E. 766; 6 L. J. (N. S.) Ex. 260; 43 R. R. 465, where it was held that the momentary seisin of a releasee to uses was insufficient to work a merger by unity of seisin.

It has been held in America that, where the dominant and servient tenements vested in the same person under separate mortgages, there was no extinguishment of the easement before foreclosure of both mortgages (*Ritger v. Parker*, 8 Cush. (Mass.) 145). Also that, where a tenant held the servient tene-

ment by a defective title, and the easement by a valid title, there was no merger (*Tyler v. Hammond*, 11 Pick. (Mass.) 193). And so when a person held one estate in severalty, and an undivided share of the other (*Atlanta Mills v. Masson*, 120 Mass. 244).

(m) *Pheysey v. Vicary*, 1847, 16 M. & W. 490; 73 R. R. 583.

(n) See *Dyer*, 295 b, pl. 19; *Sury v. Pigot*, 1625, Palmer, 444; *Boyle v. Tamlyn*, 1827, 6 B. & C. 329; 5 L. J. K. B. 134; 30 R. R. 343.

(o) *Heigate v. Williams*, 1607, Noy, 119; *James v. Plant*, 1836, 4 A. & E. 749; 6 L. J. (N. S.) Ex. 260; 43 R. R. 465.

which it flows, the easement which the latter might have claimed is extinguished (*p*).

With respect to natural rights in water, the question of the effect of unity of ownership was raised and discussed in the early case of *Sury v. Pigot* (*q*), which was an action for stopping a natural water-course. According to the report in Popham, the judgment of Whitlock, C.J., contained the following:—"Where the thing hath its being by prescription, unity will extinguish it; but where the thing hath its being ex jure nature it shall not be extinguished" (*r*). In the report of this case in Latch it is said: "Rent shall be extinguished by unity, and also a way, because it does not exist durant the unity; but it is otherwise of a thing which exists, notwithstanding the unity." A case of warren is cited from 35 Hen. 6, f. 55, 56.

Extinguishment of easements by operation of law.
Unity.

The above decisions as to the effect of unity in extinguishing an existing easement should be compared with the decisions referred to above (pp. 182, 238) as to the effect of unity during the prescriptive period upon the acquisition of an easement.

When two tenements become completely united, and, as it were, fused into one, the owner may modify the previous relative position of the different parts at his pleasure. If he exercise this right so that the part which previously served the other no longer does so—as, for instance, by changing the direction of a spout which emptied the rain-water of one house on the adjoining one—it has never been doubted that on subsequent severance no easement will revive (*s*).

Whether easements extinguished by the union of absolute interests revive on severance.

It has been contended that if he neglect to do so, and again sever the tenements, all easements having the qualities of being both continuing and apparent, as well as those which existed by necessity, will be revived upon the severance. In the 11th Hen. 7 (*t*) it was decided, "that a customary right in the city of London to have a gutter running in another man's land was not extinguished by unity of possession." It was argued that if the purchaser of both tenements had destroyed the gutter, the right would not have revived; to which Danvers, J., replied: "If the matter were so, it might have been pleaded specially: it would be a good issue." It will be found that the classes of easements with respect to which revivor is supposed to take place correspond with those already considered, as being

(*p*) *Irimcy v. Stocker*, 1866, 1 Ch. 407; 35 L. J. Ch. 467. Consider *Holland v. Deakin*, 1828, 7 L. J. (O. S.) K. B. 145; and see *Physey v. Vicary*, 1847, 16 M. & W. 489; 73 R. R. 583.

(*q*) 1625, Popham, 166; 3 Bulstrode, 339; Palmer, 444.

(*r*) See *Wood v. Ward*, 1849, 3 Ex.

775; 18 L. J. Ex. 305; 77 R. R. 809, where the above was approved by the Court of Exchequer.

(*s*) 11 Hen. 7, f. 25; *Lady Browne's Case*, cited in *Sury v. Pigot*, 1625, Palmer, 446.

(*t*) Fol. 25.

Extinguish-
ment of
easements by
operation
of law.
Unity.

Civil law.

acquired by the implied grant resulting either from the disposition of the owner of the two tenements, or from the easement being of necessity. It is practically immaterial whether the foundation of the right be a new grant or a revival of the old right; but the former is the more correct view of the title to them, and it is certainly more in harmony with the general principles of the law of easements (*u*).

In the civil law, on the union of two inheritances in the same owner, all servitudes were extinguished by confusion; and on any future severance it was necessary to reimpose them expressly (*v*).

The particular case where the dominant and servient tenements become vested in the same owner for different estates or interests has been dealt with by many judges. Thus, it was laid down by Wood, V.-C., in 1862 that the effect of such a union of ownership was not to extinguish an easement, but merely to suspend it so long as the union of ownership continued; and that upon the severance of the ownership the easement revived (*w*). Again, it was said by Bayley, B., in 1831, that a unity of possession merely suspends; there must be a unity of ownership to destroy the prescriptive right (*x*). Again, it was said by Alderson, B., in 1835: "If I am seised of freehold premises and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended. But it is not extinguished, because there is no unity of seisin, and if I part with the premises the right not being extinguished will revive" (*y*).

The application of the above rules to individual cases is not always easy. Three principles should be borne in mind, viz.: (1) No one can derogate from his own grant (*z*); (2) The law does not allow the co-existence in the same ownership of (*a*) a right to an easement (e.g. a right of way) over Whiteacre, and (*β*) an interest in possession

(*u*) *Holmes v. Goring*, ante, p. 174.

(*v*) *Servitutes prædiorum confunduntur, si idem utriusque prædii dominus esse cœperit.*—Dig. 8, 6, 1, quem. serv. amit.

Si quis ades, quæ suis adibus servient, cum emisset, traditas sibi accepit, confusa sublataque servitus est; et, si rursus vendere vult, nominatim imponenda servitus est: alioquin liberæ veniunt.—Dig. 8, 2, 30, de serv. urb. præd.

Tertio amittitur (servitus) confusione cum prædia confusa sunt, sive cum idem utriusque prædii dominus esse cœperit.—Vinnius, Comm. ad Inst. lib. 2, tit. 3,

Quibus modis serv. amittuntur, § 6.

(*w*) *Simper v. Foley*, 1862, 2 J. & H. 563; 134 R. R. 337.

(*x*) *Canham v. Fisk*, 1831, 2 C. & J. 126; 1 L. J. (N. S.) Ex. 61; 37 R. R. 655.

(*y*) *Thomas v. T.*, 1835, 2 C. M. & R. 41; 4 L. J. (N. S.) Ex. 179; 41 R. R. 678, where see note. See also the judgment of Eyre, C.J., in *Whalley v. Thompson*, 1799, 1 Bos. & P. 375; 4 R. R. 826; and the opinion of the Court of Common Pleas in *Buckby v. Colas*, 1814, 5 Taunt. 314; 15 R. R. 508.

(*z*) *Brown v. Flower*, 1911, 1 Ch. 224; 80 L. J. Ch. 181. See ante, p. 110.

in Whiteacre (a) : (3) If two such rights or interests become vested in the same owner, and he continues to exercise his right of way, the law will attribute this exercise to his interest in possession in Whiteacre, and not to his easement (b).

Extinguishment of easements by operation of law.
Unity.

Upon this subject there have been the following decisions. Where the owner in fee of the dominant tenement acquired an outstanding lease in the servient tenement, but subsequently parted with the lease, it was held in effect that during the union of ownership the easement of light was not extinguished, and that upon a severance of the ownership the easement revived (c).

Again, where A., the owner in fee of the dominant tenement, granted a lease thereof to X. and subsequently sold his reversion in fee to B., who was the owner in fee in possession of the servient tenement, it was held in effect that during X.'s term the easement of light continued, there being no extinguishment. A. could not derogate from his grant so as to interfere with X.'s right to the easement, nor could B. standing in the place of A. (d). In such a case on the falling in of X.'s lease extinguishment would of course follow.

SECT. 2.—Of the Extinguishment of Easements by Statute.

An easement may be extinguished by statute. The extinguishment may result from express words, e.g., from the words of the 8th section of the Inclosure Act, 1801, or the 68th section of the Inclosure Act, 1845, that "ways shall be for ever stopped up and extinguished" (e); or it may result from the words of the special Act of a railway company (f). The extinguishment may also result by necessary implication from a statute. Thus, where the Legislature distinctly authorizes the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone (g). Generally speaking, where a statute which extinguishes a right is repealed, the repeal will not revive the right (h).

Extinguishment of easements by statute.

As regards the extinguishment of private rights of way under the

(a) *Ladyman v. Grave*, 1871, 6 Ch. 768.

(b) *Bolton v. B.*, 1879, 11 Ch. D. 971; 48 L. J. Ch. 467. See *Bright v. Walker*, 1834, 1 C. M. & R. 219; 3 L. J. (N. S.) Ex. 250; 40 R. R. 536.

(c) *Simper v. Foley*, 1862, 2 J. & H. 563; 134 R. R. 337.

(d) *Richardson v. Graham*, 1908, 1 K. B. 39 (see the judgment of Kennedy, L.J., at p. 46); 77 L. J. K. B. 27.

(e) 41 Geo. 3. c. 109, s. 8; 8 & 9 Vict. c. 118, s. 68; *Turner v. Crush*,

1879, 4 App. Cas. 221; 48 L. J. Ex. 481.

(f) See *A.-G. v. Great Central R. Co.*, 1912, 2 Ch. 124; 81 L. J. Ch. 121.

(g) *Yarmouth v. Simmons*, 1878, 10 Ch. D. 527; 47 L. J. Ch. 792, where it was shown that the construction of a pier authorized by statute would be physically inconsistent with the existence of a public right of way.

(h) *Gwynne v. Drewitt*, 1894, 2 Ch. 616; 63 L. J. Ch. 870 (the case of a public right of way).

Extinguishment of easements by statute.

Easements affecting lands compulsorily taken.

Inclosure Acts, it should be mentioned that a proviso in s. 8 of the Inclosure Act, 1801, requires an order of two justices for stopping up an "old or accustomed road." It seems that this proviso only applies to public roads, and not to private ones (*i*). Where the road is stopped up under the Inclosure Act, 1845, no order of the justices is required (*k*).

Where lands compulsorily taken under numerous statutes giving compulsory powers are subject to an easement, the person entitled to the easement cannot in general bring an action for disturbance; nor is he entitled to notice to treat. His remedy is by claiming compensation as for lands injuriously affected (*l*). If the Act confers no power to interfere with the easement, the remedy is by action (*m*).

Where a railway company's private Act extinguished, without compensation, "all rights of way in, over, and affecting" certain "footways," the clause affected only public rights, and did not extinguish a private right of way (*n*).

(*i*) *White v. Reeves*, 1818, 2 Moore, 23; 19 R. R. 536; *Holden v. Tilley*, 1859, 1 F. & F. 653; 115 R. R. 960; *Race v. Ward*, 1857, 7 E. & B. 384; 26 L. J. Q. B. 133; 110 R. R. 637. See, contra, *Harber v. Rand*, 1821, 9 Price, 58; 23 R. R. 638; *Thackrah v. Seymour*, 1832, 1 Cr. & M. 18; 2 L. J. (N. S.) Ex. 10; 38 R. R. 575.

(*k*) See 8 & 9 Vict. c. 118, ss. 62—68. The "old inclosures" referred to in these sections are discussed and explained: *Hornby v. Sylvester*, 1888, 20 Q. B. D. 797; 57 L. J. Q. B. 558. As to the construction of local Inclosure Acts giving powers to stop up roads, see, further, *Logan v. Barton*, 1826, 5 B. & C. 513; 4 L. J. K. B. 217; 29 R. R. 308; *R. v. Hatfield*, 1835, 4 A. & E. 156; 43 R. R. 322.

(*l*) See, under the Lands Clauses Act, 1845, *Eagle v. Charing Cross R. Co.*, 1867, L. R. 2 C. P. 638; 36 L. J. C. P. 297; *Bedford v. Dawson*, 1875, 20 Eq. 353; 44 L. J. Ch. 549; *Wigram v. Fryer*, 1887, 36 Ch. D. 87; 56 L. J. Ch. 1098; *Kirby v. Harrogate Board*, 1896, 1 Ch. 437; 65 L. J. Ch. 376; *Manchester R. Co. v. Anderson*, 1898, 2 Ch. 394; 67 L. J. Ch. 568; *Long Eaton v. Midland R. Co.*, 1902, 2 K. B. 574; 71 L. J. K. B. 837; and *Barnard v. G. W. R.*, 1902, 86 L. T. 798; and under the Railways Clauses Act, *Hutton v. L. & S. W. R. Co.*, 1848, 7 Ha. 259; 18 L. J. Ch. 345; 82 R. R. 99; *Caledonian R. Co. v. Walker*, 1882, 7 App. Cas. 259; *Ford v. Metropolitan and Metropolitan District R. Cos.*,

1886, 17 Q. B. D. 12; 55 L. J. Q. B. 296; *R. v. Poulter*, 1887, 20 Q. B. D. 132; 57 L. J. Q. B. 138; *Re London and Tilbury R. Co.*, 1889, 24 Q. B. D. 326; 59 L. J. Q. B. 162; *Emsley v. N. E. R. Co.*, 1896, 1 Ch. 418; 65 L. J. Ch. 385; and cf., under an earlier private Act, *Thicknesse v. Lancaster Canal Co.*, 1838, 4 M. & W. 472; 8 L. J. (N. S.) Ex. 49; 51 R. R. 692; under the Waterworks Clauses Act, 1847, *Bush v. Trowbridge Waterworks*, 1875, 10 Ch. 459; 44 L. J. Ch. 645; and *Holliday v. Mayor of Wakefield*, 1891, A. C. 81; 60 L. J. Q. B. 361; under the Thames Embankment Act, 1862, *Macey v. Met. Board of Works*, 1864, 10 Jur. N. S. 333; 33 L. J. Ch. 377; under the Elementary Education Act, 1870, *Clark v. School Board for London*, 1874, 9 Ch. 120; 43 L. J. Ch. 421; *London School Board v. Smith*, 1895, W. N. 37; and *Kirby v. Harrogate School Board*, ubi sup.; under the Artisans' and Labourers' Dwellings Improvement Act, 1875, *Badham v. Maris*, 1882, 45 L. T. 579; 52 L. J. Ch. 237 n.; *Swainston v. Finn*, 1883, 52 L. J. Ch. 235; 48 L. T. 634; 31 W. R. 498; and *Barlow v. Ross*, 1890, 24 Q. B. D. 381; 59 L. J. Q. B. 183; and under the Housing of the Working Classes Act, 1890, *Re Harvey and London C. C.*, 1909, 1 Ch. 528; 78 L. J. Ch. 285.

(*m*) *Turner v. Sheffield R. Co.*, 1842, 10 M. & W. 425; 62 R. R. 656.

(*n*) *Wells v. London and Tilbury R. Co.*, 1877, 5 Ch. D. 126.

The Metropolitan Building Acts do not affect easements. The provisions which authorize the raising of party-walls confer no authority to raise them to the prejudice of a neighbour's right to light (o). Extinguishment of easements by statute.

Under the Settled Land Act, 1882 (p), a tenant for life can sell "the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same." The latter words seem only to authorize the tenant for life to subject the settled land to an easement for the benefit of some other tenement. There is no express power for him to release an easement appurtenant to the settled land (q). But it seems that the same result might be arrived at by his selling the easement to the owner of the servient tenement. Settled Land Act, 1882

In the event of an easement already acquired by prescription vesting in the owner of the dominant tenement by statutory authority, the prescriptive title will merge in the statutory title, and if the operation of the statute be limited to a period the easement will be lost on the expiration of the period (r). "I hold it to be an indisputable proposition of law that where an Act of Parliament has, according to its true construction, to use the language of Littledale, J., 'embraced and confirmed' a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and the lower title by custom or prescription is merged in, and extinguished by, the higher title derived from the Act of Parliament" (s).

SECT. 3.—*Of the Extinguishment of Easements by Express Release.*

An easement may be extinguished by express release. It would appear that, in the case of easements, as of other incorporeal rights, an express release, to be effectual at law, must be under seal (t). Express release.

(o) See, e.g., on 14 Geo. 3, c. 78, *Titterton v. Conyers*, 1813, 5 Taunt. 465, and *Wells v. Ody*, 1836, 1 M. & W. 452; 5 L. J. (N. S.) Ex. 199; 46 R. R. 358; on 18 & 19 Vict. c. 122, ss. 83, 85, *Crofts v. Haldane*, 1867, L. R. 2 Q. B. 194; 36 L. J. Q. B. 85; and, on a Bristol Improvement Act, *Weston v. Arnold*, 1873, 8 Ch. 1084; 43 L. J. Ch. 123. The London Building Act, 1894, contains an express provision (s. 101) to the like effect.

(p) 45 & 46 Vict. c. 38, s. 3. See also the Settled Land Act, 1890, s. 5, authorizing the creation of easements on exchange or partition.

(q) *Re Brotherton*, 1907, W. N. 230;

1908, W. N. 56.

(r) *Taylor v. New Windsor*, 1899, A. C. 41; 67 L. J. Q. B. 96; *Manchester v. Lyons*, 1882, 22 Ch. D. 287.

(s) Per Lord Davey in *New Windsor v. Taylor*, 1899, A. C. 49; 67 L. J. Q. B. 96.

(t) Co. Litt. 264 b; Com. Dig. Release (A. 1), (B. 1). See judgment of Willes, J., in *Lovell v. Smith*, 1857, 3 C. B. N. S. 127; but see *Norbury v. Meade*, 1821, 3 Bligh, 241. In *Poulton v. Moore*, 1915, 1 K. B. 400; 84 L. J. K. B. 462, a release of a right of way resulted from a deed operating by estoppel.

Express release.

This rule, however, must not be taken to exclude a written instrument not under seal, or even a parol declaration, as evidence to show the character of any act done, or any cessation of enjoyment. And in equity an easement may be lost or modified by agreement (u).

It seems that a release by deed "which is the act of the parties shall be taken most strongly against himself" (x).

Extinguishment of easement implied from dominant owner's licence.

SECT. 4.—*An Easement may be extinguished by Implied Release. And herein (A) of a Release implied from a Licence given by the Owner of the Dominant Tenement to the Owner of the Servient tenement; (B) of a Release implied from the Dominant Owner ceasing or altering the User of the Easement.*

(A) OF A RELEASE IMPLIED FROM A LICENCE GIVEN BY THE OWNER OF THE DOMINANT TENEMENT TO THE OWNER OF THE SERVIENT TENEMENT.

Licence to obstruct.

It has already been seen, on the clearest authority both of our own law and the civil law, that if the owner of the dominant tenement authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, it is thereby extinguished (y). And provided the authority is exercised, it is immaterial whether it was given by writing or by parol (z).

(B) OF THE EXTINGUISHMENT OF EASEMENTS IMPLIED FROM THE DOMINANT OWNER CEASING OR ALTERING THE USER OF THE EASEMENT.

I. Generally.

Extinguishment implied from dominant owner ceasing or altering user:—

I. Generally.

As the acquisition of an easement is an addition to the ordinary rights of property of the dominant and a corresponding diminution of those rights of the servient tenement, so the loss of the easement,

(u) *Davies v. Marshall*, 1861, 10 C. B. N. S. 710; 31 L. J. C. P. 61; *Fisher v. Moon*, 1865, 11 L. T. N. S. 623; *Waterlow v. Bacon*, 1866, 2 Eq. 514; 35 L. J. Ch. 643. Cf. *Salaman v. Glover*, 1875, 20 Eq. 444; 44 L. J. Ch. 551, where a lease was held to be controlled by the terms of a prior agreement.

(x) Co. Litt. 265 a.

(y) Ante, pp. 36, 61; and see *Davies v. Marshall*, 1861, 10 C. B. N. S. 697; 7 Jur. N. S. 720, 1247; 31 L. J. C. P. 61; *Johnson v. Wyatt*, 1864, 9 Jur. N. S. 1333; 33 L. J. (N. S.) Ch. 394.

Si stillicidii immittendi jus habeam in

aream tuam, et permisero jus tibi in eâ arcâ ædificandi, stillicidii immittendi jus amitto. Et similiter, si per tuum fundum via mihi debeatur, et permisero tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ.—Dig. 8, 6, 3, quem. serv. amit.

Amittitur servitus remissione, tum apertâ tum tacitâ—puta si permisero domino fundi servientis, in loco serviente, facere id quo servitus impediatur.—Vinnius, Comment. ad Inst. L. 2, tit. Quibus modis servitutes amittuntur, § 6.

(z) *Liggins v. Inge*, ante, p. 43.

when once acquired, by restoring both tenements to their natural state, is an addition to the rights of the servient and a corresponding diminution of those of the dominant.

Hence the following result. It is true, on the one hand, that the law regards with less favour the acquisition and preservation of these accessorial rights than of those which are naturally incident to property, and, therefore, does not require the same amount of proof of the extinction as of the original establishment of the right (*a*). On the other hand, as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the absolute owner of the dominant tenement must be necessary to give validity to any act of abandonment (*b*). The doctrine of the extinction of easements by unity of ownership supports this view, proceeding, as it does, on the ground that the loss of an easement is a permanent injury to the inheritance, and can therefore only result from unity when the person in whom the union occurs is the owner of the fee simple of both servient and dominant tenements.

The Prescription Act is silent as to the mode by which easements may be lost. Its enactments as to interruption and disabilities apply in terms to the acquisition only.

It is the policy of the law, favouring the freedom of property, that no restriction should be imposed upon one tenement without a corresponding benefit arising from it to another, and hence it is that it is essential to the validity of an easement that it should conduce to the more beneficial enjoyment of the dominant tenement. If, therefore, any alteration be made in the disposition of the dominant tenement, of such a nature as to make it incapable any longer of the perception of the particular easement, the status of the dominant tenement, to which the easement was attached, and which is an inherent condition of its existence, is determined. Such alteration must, of course, be of a permanent character, evincing an intention of ceasing to take the particular benefit, or otherwise an easement might be lost by the mere pulling down of the tenement for the purposes of necessary repair (*c*).

Extinguish-
ment implied
from
dominant
owner ceasing
or altering
user.

(a) "Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the (Prescription) Act": per Stirling, J., 1900, 2 Ch. at p. 146.

(b) As to the loss of an inchoate right to light acquired under the Pre-

scription Act, 1832, ss. 3 and 4, see *Hyman v. Van den Bergh*, 1907, 2 Ch. 516; 1908, 1 Ch. 167; 77 L. J. Ch. 154.

(c) *Luttrell's Case*, 1738, 4 Rep. 86; *Staight v. Burn*, 1869, 5 Ch. 163; 39 L. J. Ch. 289; *Eccl. Commrs. for England v. Kino*, 1880, 14 Ch. D. 213;

Extinguishment implied from dominant owner ceasing or altering user.

By the civil law the pulling down a house with the intention of rebuilding did not cause the loss of a servitude, provided the new edifice was erected upon the site and of the dimensions of the old, and did not increase the burden imposed upon the servient tenement (*d*).

The question of the extinguishment of easements by the dominant owner ceasing or altering the user may be conveniently further considered by distinguishing between two classes of easements — First, continuous easements, viz., those of which the enjoyment is or may be continual without the necessity of interference by man; such as a right to light. These easements require for their enjoyment a permanent adaptation of the dominant tenement. Secondly, discontinuous easements, viz., those of which the enjoyment can only be had by the interference of man; such as a right of way. These easements require no permanent adaptation of the dominant tenement. In the case of both these classes of easements questions arise as to the effect in law of (1) the actual cessation of enjoyment, and (2) an alteration in the mode of user, whether accompanied or not by an alteration of the dominant tenement. Under the last head must be considered those difficult cases where, instead of there being an intention to relinquish the right, an attempt has been made to usurp a greater right than the dominant owner was entitled to or to enjoy it in a different manner. And here it may be pointed out that in the case of continuous easements it may often be a matter of great difficulty to ascertain the extent of the usurpation or excess, in other words, to sever the increased burden attempted to be imposed on the servient tenement. In the case of discontinuous easements the extent of the acts of usurpation or excess can usually be easily ascertained; in other words, the increased burden can be severed.

II. Extinguishment of continuous easements implied from cessation of user.

II. *Of the Extinguishment of Continuous Easements by the Dominant Owner ceasing or altering the User.*

The cases in which this question has most frequently been raised have been cases relating to the easement of light, where there has been an actual cessation for a longer or shorter period of the old enjoyment. It appears from these cases that the law has fixed no

49 L. J. Ch. 529. Cf. per Fry, J., in *National Provincial Co. v. Prudential Co.*, 1877, 6 Ch. D. 757, at p. 764; 46 L. J. Ch. 871.

(*d*) (*Si servitus stillicidii non avert-*

endi debebatur); si antea ex tegulâ cassitaverit stillicidium, postea ex tabulato, vel ex aliâ materiâ, cassitare non potest.—Dig. 8, 2, 20, § 4, de serv. præd. urb.

precise time during which this cessation must continue. The material inquiry must always be whether there was an intention to abandon the right.

Certain acts will clearly show the intention to abandon; e.g., the shutting up of windows with bricks and mortar for twenty years (*e*). Again, in the leading case of *Moore v. Rawson* (*f*) the plaintiff pulled down his wall, in which there were some ancient windows, and rebuilt it as a blank wall. Fourteen years later the defendant erected a building in front of this blank wall. Three years afterwards the plaintiff opened in the blank wall a window in the place of one of the ancient windows, and sued the defendant for obstruction. The action failed, the Court holding that the plaintiff had abandoned his right. In his judgment in that case it was said by Littledale, J., that if a man pulls down a house and does not make any use of the land for two or three years or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house, and consequently that the right to the light has ceased (*g*).

On the other hand, the mere alteration of a building containing ancient lights does not imply abandonment (*h*). Nor, again, does the mere pulling down of a building destroy the right. Thus, in *Ecclesiastical Commissioners v. Kino* (*i*) a church became vested in the Commissioners upon trust to pull it down and sell the site. The church having been pulled down, but not yet sold, the defendant commenced to build upon the adjoining land in a way which would have obstructed the light to the ancient church windows had they still been subsisting. In an action brought by the Commissioners the defendant was restrained from "obstructing the lights of any building to be erected on the site of the church, so far as such lights occupied the same position as the lights of the church." The Court of Appeal thought that the Commissioners were entitled to sell the land with the right to rebuild. "It appears to me," said James, L.J., "that, where a building in which there are ancient lights has been taken down, though the actual enjoyment of the light has been suspended, there is nothing to prevent the owner from applying to the Court for an injunction to restrain an erection which would interfere with the easement of the ancient lights, where the Court is satisfied that he is about to restore the building with its ancient

II. Extinction of continuous easements implied from cessation of user.

(*e*) *Lawrence v. Obee*, 1814, 3 Camp. 514; 14 R. R. 830.

(*f*) 1824, 3 B. & C. 332; 3 L. J. K. B. 32; 27 R. R. 375.

(*g*) *Ibid.*, p. 341. See also the judgment of Tindal, C.J., in *Liggins v. Inge*, 1831, 7 Bing. 693; 9 L. J. C. P.

202; 33 R. R. 615.

(*h*) *Greenwood v. Hornsey*, 1886, 33 Ch. D. 471; 55 L. J. Ch. 917. See *Stokoe v. Singers*, 1857, 8 E. & B. 31; 26 L. J. Q. B. 257; 112 R. R. 459.

(*i*) 1880, 14 Ch. D. 213; 49 L. J. Ch. 529.

II. Extinguishment of continuous easements implied from cessation of user.

Onus of proving intention.

lights. That was so decided by Lord Justice Giffard in *Staight v. Burn* (k).

The question turning upon intention, there has been discussion as regards the onus of proving this intention. It seems that where shortly after it has been pulled down a house is rebuilt, and rebuilt in such a way that the new windows will receive a considerable portion of the light which went into the old windows, it is unnecessary to give further evidence of intention to preserve the right (l).

On the other hand, in *Moore v. Rawson* (m), Abbott, C.J., in his judgment used the following words:—"It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, it was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect."

Necessity for an act by servient owner.

From the language of the judges in cases before *Stokoe v. Singers* (n) it does not appear to be necessary, where a building containing ancient lights has been altered, that after the alteration the servient owner should have done any act on the faith that the easement had been extinguished. In *Stokoe v. Singers* there are dicta to the effect that in order to make out an extinguishment of the easement such an act is essential. But these dicta have never been followed.

Although, however, there appears to be no sufficient authority in our law for requiring any such act as the condition of the extinguishment of an easement, yet such an act, unopposed by the owner of the dominant tenement, as in the case of *Moore v. Rawson*, would be almost conclusive evidence that there was no intention to preserve the easement (n).

Civil law.

By the civil law an urban servitude could not be lost by mere

(k) 1869, 5 Ch. 163; 39 L. J. Ch. 289.

(l) *Smith v. Baister*, 1900, 2 Ch. 142; 69 L. J. Ch. 437; *Scott v. Pape*, 1886,

31 Ch. D. 567; 55 L. J. Ch. 426.

(m) 1824, 3 B. & C. 336; 3 L. J. K. B. 32; 27 R. R. 375.

(n) *Ubi sup.*

abandonment on the part of the owner of the dominant, unless, during the cessation of enjoyment, some act were done by the owner of the servient tenement evincing an intention of defeating the servitude—as if a man having a window should have stopped it up during a certain time, a previously acquired easement of the passage of light would not have been lost, unless the owner of the servient tenement had done something during the interval to obstruct the passage of light. So, too, in the case of an easement tigni immittendi, mere removal of the beam was not sufficient to defeat the right, unless the owner of the servient tenement stopped up the hole in which the beam was placed (*o*). And, on the same ground, by no lapse of time would the right be lost during which, owing to the delay in rebuilding the servient tenement, the easement could not be exercised (*p*).

Turning now to the cases where there has been no actual cessation of user of the continuous easement, but there is an alteration in the mode of user, whether accompanied, or not, by an alteration of the dominant tenement. In such cases the rule seems to be that where the alteration does not impose any additional burden on the servient tenement, there is no extinguishment of the easement. On the other hand, an alteration which imposes an additional burden may destroy the easement altogether (*q*).

In 1602 this question came before the Courts in *Luttrell's Case*, which has ever since been treated as a leading authority (*r*). There an action was brought for the diversion of water. The declaration stated that “the plaintiff, on the 4th of March in the 40th year of Elizabeth, was seised in fee of two old and ruinous fulling-mills, and that from time whereof, &c., magna pars aquæ cujusdam rivuli ran from a place called Hod Weir to the said mills; and that for all the

Extinguishment of continuous easements implied from alteration of user.

No additional burden imposed on servient tenement, no extinguishment.

Luttrell's Case.

(*o*) Hæc autem jura similiter, ut rusticorum quoque prædiorum, certo tempore non utendo pereunt; nisi quod hæc dissimilitudo est, quod non omnimodo pereunt non utendo; sed ita si vicinus simul libertatem usucapiat, veluti si ædes tuæ ædibus meis serviant “ne altius tollantur,” “ne luminibus mearum ædium officiantur”; et ego per statutum tempus fenestras meas præfixas habuero vel obstruxero; ita demum jus meum amitto, si tu per hoc tempus ædes tuas altius sublatas habueris; alioquin si nihil novi feceris, retineo servitutem. Item si “tigni immissi” ædes tuæ servitutem debent, et ego exemero tignum, ita demum amitto jus meum, si tu foramen unde exemptum est tignum obturaveris et per constitutum tempus ita habueris; alioquin, si nihil novi feceris, integrum

jus meum permanet.—Dig. 8, 2, 6, de serv. præd. urb.

(*p*) Si cum jus haberes immittendi, vicinus statuto tempore ædificatum non habuerit, ideoque nec tu immittere poteris, non ideo magis servitutem amittes; quia non potest videri usucapisse vicinus tuus libertatem ædium suarum, qui jus tuum non interpellavit.—Dig. 8, 6, 18, § 2, quem. serv. amit.

(*q*) For the first branch of the rule, see the cases quoted post, p. 468. For the second branch, see post, p. 469; and compare the cases as to discontinuous easements, post, pp. 480 et seq.

(*r*) *Luttrell's Case*, 1602, 4 Rep. 86 a, recognized and applied in recent cases—e.g., *Colls v. Home Stores*, 1904, A. C. 202; 73 L. J. Ch. 484; *A.-G. v. Reynolds*, 1911, 2 K. B. 896; 80 L. J. K. B. 1073.

Extinguishment of continuous easements implied from alteration of user.

Luttrell's Case.

said time there had been a bank to keep the water within the current; and that afterwards the plaintiff, on the 8th October, 41 Eliz., pulled down the said fulling-mills, and in June, 42 Eliz., in place of the said fulling-mills erected two mills to grind corn, and said water ran to the said mills until the 10th September next following; and the same day the defendants foderunt et fregerunt the bank, and diverted the water from his mills, &c.

“The defendants pleaded not guilty, and it was found against them, on which the plaintiff had judgment; upon which the defendant brought a writ of error in the Exchequer Chamber, on which two errors were assigned. The principal of these was, that, by the breaking and abating of the old fulling-mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription and could not prescribe to have any watercourse to grist-mills: ‘As if a man grants me a watercourse to my fulling-mills, I cannot, as it was said, convert them to corn-mills, nec e contra.’ One of the cases cited in argument was from 10 Hen. 7, 13 a, b, and 16 Hen. 7, 9 a, b, ‘where the abbot of Newark granted by fine to find three chaplains in such a chapel of the conusee; afterwards the said chapel fell, and there tenetur—(during the time there is no chapel), the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large, sub dio; but tenetur, if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service again;’ but (it was collected) if it is built in another place, then the grantee is not bound to do divine service there.”

The next case cited supports the principle that an alteration, whereby a greater burthen would be imposed, destroys the right altogether. “If there be lord and tenant, and the tenant holds to cover and repair the lord’s hall, as in the 10 Edw. 3, 23, in this case, if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, a stable, a kitchen, or the like, he is not bound to cover it; for the lord, by his act, cannot alter the nature of the tenure, nor of the service which the tenant ought to do.”

“It was contended in argument, that the alteration from fulling-mills to corn-mills might be injurious to the grantor, because he might have corn-mills himself, the proximity of others to which might injure him; and the principle was denied, that a man may

preserve an easement by rebuilding on the same spot, and in the same manner, unless the previous destruction had been caused by some act of God, as by tempest or lightning.

“ But it was resolved that the prescription did extend to these new grist-mills, for it appears by the register, and also by Fitz. Nat. Brev., that if a man is to demand a grist-mill, fulling-mill, or any other mill, the writ shall be general, *de uno molendino*, without any addition of grist or fulling. 21 Ass. 23, agrees of a plaint in assize ; so that the mill is the substance and thing to be demanded, and the addition of grist or fulling is but to show the quality or nature of the mill ; and therefore, if the plaintiff had prescribed to have the said watercourse to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as it was before ; and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody would build a mill before he was sure to have water, and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid.’

Extinguish-
ment of
continuous
easements
implied from
alteration
of user.
Luttrell's Case.

“ So, if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed ; and although he builds a new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers on the part newly added, —the same law of conduits and water-pipes and the like. So, if a man has an old window to his hall and afterwards he converts the hall into a parlour, or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house.

“ And although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally, but particularly to his fulling-mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality or name of the mill, and that without any prejudice in the watercourse to

Extinguishment of continuous easements implied from alteration of user.

Luttrell's Case.

Saunders v. Newman.

the owner thereof, for these reasons it was resolved that the prescription remained."

A further case is mentioned of a grant to a corporation, who were afterwards incorporated by another name; it was held, that they retained all their franchises and privileges, because no person would be prejudiced thereby.

In *Saunders v. Newman* (s), where the claim in the declaration was for a mill generally, the right to the discharge of water was not lost by an alteration in the dimensions of the mill-wheel. "The owner of a mill," said Abbott, J., "is not bound to use the water in the same precise manner or to apply it to the same mill; if he were, that would stop all improvements in machinery; if, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

Hall v. Swift.

In *Hall v. Swift* (t) the plaintiff had a right to water flowing from the defendant's land across a lane to his own land. Previously the stream had meandered down the lane before it flowed into the plaintiff's land. But the plaintiff varied the course by making a straight cut to his own premises. This, it was contended, negatived the right. Tindal, C.J., said: "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked bank or footpath would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself."

Hale v. Oldroyd.

In *Hale v. Oldroyd* (u) the plaintiff had a right to a flow of surplus water to an ancient pond. Instead of using the water to supply that pond, he had during thirty years past used it to supply three more recent ponds. It was held he had not abandoned or lost his right to the flow of water by such user. Rolfe, B., said: "If the plaintiff had even filled up the (old) pond, that would not in itself amount to an abandonment, although, no doubt, it would be evidence of it." And Parke, B., said: "The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones; he did not thereby abandon his right, he only exercised it in a different spot,—and a substitution of this nature is not an abandonment."

Watts v. Kelson.

In *Watts v. Kelson* (x) the right to a watercourse which had been

(s) 1818, 1 B. & Ald. 258; 19 R. R. 312.

(t) 1838, 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728 (a case of an alteration in the enjoyment of a

natural right).

(u) 1845, 14 M. & W. 789; 15 L. J. Ex. 4; 69 R. R. 824.

(x) 1870, 6 Ch. 166; 40 L. J. Ch. 126.

used to supply cattle-sheds was not lost by the erection of cottages in their place.

The easement of eavesdropping might be extinguished by an alteration of the projection of the roof from which it could be inferred that the dominant owner meant to direct the rain-water into a different channel. But where a greater burden is not thrown on the servient tenement such an easement will not be lost either by increasing the projection (*y*) or by raising the house (*z*).

Of the rule set out at p. 465, the second branch which states that an alteration of the dominant tenement which imposes an additional burden on the servient tenement may destroy the continuous easement altogether is illustrated by *Angus v. Dalton* (*a*), where the easement of lateral support of a house by adjacent soil was lost by the taking down of the old house and substituting a building of an entirely different construction.

But the cases in which the suggestion has been most frequently made that the continuous easement has been destroyed are cases relating to the easement of light (*b*). These decisions are numerous, and for a long time there was much doubt about the doctrine. In view of the importance of the questions raised, some of the decisions must now be referred to.

One of the most important of the early decisions was *Martin v. Goble* (*c*), where a building having been used for upwards of twenty years as a malt-house was converted into a dwelling-house. In an action for obstruction of light, the question for the jury was held to be whether, if the building had remained in the condition of a malt-house, a proper degree of light for making malt was prevented entering the windows by the obstruction. Macdonald, C.B., said that the converting of the building from a malt-house to a dwelling-house could not affect the rights of the owner of the adjoining ground, for "no man could by any act of his suddenly impose a new restriction upon his neighbour." This decision has been much criticized (*d*), but

Extinguishment of continuous easements implied from alteration of user.
Eaves-dropping.
Watts v. Kilson.

Additional burden imposed on servient tenement; this may be extinguishment of easement.

Decisions as to the easement of light.

Martin v. Goble.

(*y*) *Thomas v. T.*, 1835, 2 C. M. & R. 34; 4 L. J. (N. S.) Ex. 179; 41 R. R. 678.

(*z*) *Harvey v. Walters*, 1872, 8 C. P. 162; 42 L. J. C. P. 105.

(*a*) 1877, 3 Q. B. D. 102; 47 L. J. Q. B. 163.

(*b*) See Lord Davey's words in *Colls v. Home Stores*, 1904, A. C. 202; 73 L. J. Ch. 484: "It would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will

of the owner of the dominant tenement. . . . I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrell's Case*.

(*c*) 1808, 1 Camp. 320. See also the earlier cases: *Cherrington v. Abney*, 1709, 2 Vern. 646; *East India Co. v. Vincent*, 1740, 2 Atk. 83.

(*d*) See *Moore v. Hall*, 1878, 3 Q. B. D. 178; 47 L. J. Q. B. 334; *Dent v. Auction Mart Co.*, 1866, 2 Eq. 250; 35 L. J. Ch. 555.

Extinguishment of continuous easements implied from alteration of user.

Martin v. Goble.

Opinion expressed by Mr. Gale in 1848 as to the extinguishment of easements by encroachment.

Alteration in size or number of windows.

Subsequent Decisions as to obstruction of altered lights.

Renshaw v. Baun.

may be supported on the ground that (to use the language of *Luttrell's Case*) "the alteration affected the substance and not only the quality of the tenement" (e).

The question was further considered by Lord Kenyon in *Cotterell v. Griffiths* (f), by Le Blanc, J., in *Chandler v. Thompson* (g), by Lord Denman in *Garritt v. Sharp* (h), and by Patteson, J., in *Blanchard v. Bridges* (i).

Commenting upon the above decisions, Mr. Gale observed that it was directly admitted in many of the cases, and in none was it denied, that the right of the owner of the dominant tenement to make alterations in the mode of his enjoyment was, in all cases, subject to the condition that no additional restriction or burden be thereby imposed on the servient heritage; and that although, where the amount of excess could be ascertained and separated, as in the case of *Estovers* (j), such excess alone was bad, and the original right would nevertheless remain, yet, in those cases where the original and excessive uses were so blended together that it would be impossible, or even difficult, to separate them, and to impede the one without, at the same time, affecting the enjoyment of the other, the right to enjoy the easement at all appeared to be lost, so long as the dominant tenement remained in its altered form. It was admitted by the Court of King's Bench, in the case of *Garritt v. Sharp* (k), that "the mode of enjoying an easement might be so changed as to defeat the right altogether"; and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed (l).

In several subsequent decisions it was laid down that where an owner of the dominant tenement altered his ancient lights, or opened additional lights, he had not necessarily lost or suspended his admitted right; but that the alterations or the opening of the additional lights justified the owner of the servient tenement in obstruct-

(e) See *Colls v. Home Stores*, 1904, A. C. 202; 73 L. J. Ch. 484.

(f) 1801, 4 Esp. 69.

(g) 1811, 3 Camp. 80; 13 R. R. 756. The judgment of Le Blanc, J., appears to be in accordance with the view afterwards adopted in the H. L.

(h) 1835, 3 A. & E. 325.

(i) 1835, 3 A. & E. 176. It is doubtful how far this case can now be relied on: see in *Scott v. Pape*, 1886, 31 Ch. D. 554; the judgments of North,

J., at p. 561, and of Bowen, L.J., at p. 573; 55 L. J. Ch. 426.

(j) *Luttrell's Case*, 1738, 4 Rep. 86 a; above, p. 465.

(k) 1835, 3 A. & E. 325; 4 Nev. & M. 834.

(l) These comments of Mr. Gale occur in the 2nd edition of the present treatise (published in 1848), at p. 373, and were repeated in subsequent editions.

ing the ancient lights, if in fact the doing so was unavoidable in the exercise of his right to obstruct the new lights (*m*). Accordingly it was held in equity that in such a case an injunction would not be granted to restrain the obstruction, except upon the terms of the plaintiff blocking up the new lights and restoring the ancient lights to their previous position (*n*).

The whole subject was reviewed in *Tapling v. Jones*, a case which was carried to the House of Lords. This was an action for obstructing the lights of the house of the plaintiff, who had altered the size and position of his lower windows, which were ancient, so that the new windows occupied parts only of the old apertures. He had also added upper windows in such a position that it was impossible for the adjoining owner to obstruct them without also obstructing the ancient portion of the new lower windows. The defendant, who was tenant of the adjoining property, built thereon a wall which obstructed the whole of the plaintiff's windows. Subsequently the plaintiff restored his lower windows to their original size and position, blocked up his new upper windows, and called on the defendant to pull down his wall. The defendant refused, and the action was commenced. At the trial a verdict was found for the plaintiff subject to a special case which was argued before the Court of Common Pleas. There was much difference of opinion, but in the result judgment was entered for the plaintiff (*o*). This was affirmed in the Exchequer Chamber, where there was also much difference of opinion (*p*). The case was ultimately taken to the House of Lords, who affirmed the Exchequer Chamber. The question in dispute turned on the nature of the right to light acquired under the Prescription Act; and the theory of this right was discussed by the judges in the House of Lords (*q*).

Lord Westbury, after citing the 3rd section of the Act (ante, p. 198), observed that the right to light now depended upon positive enactment, and did not require, and therefore ought not to be rested on, any presumption of grant, or fiction of a licence having been obtained from the adjoining proprietor. "The right is declared by the statute to be absolute and indefeasible: and it would seem, there-

Extinguishment of continuous easements implied from alteration of user.

Renshaw v. Bean.

Tapling v. Jones.

(*m*) *Renshaw v. Bean*, 1852, 18 Q. B. 112; *Hutchinson v. Copestake*, 1860, 9 C. B. N. S. 863; 127 R. R. 905; *Binckes v. Pash*, 1861, 11 C. B. N. S. 324; 31 L. J. C. P. 121; 132 R. R. 566; *Davies v. Marshall*, 1861, 1 Dr. & Sm. 557; 127 R. R. 208. See also *Wilson v. Townend*, 1861, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 127 R. R. 124; *Turner v. Spooner*, ib. 467; *Curriers' Co. v. Cor-*

bett, 1865, 2 Dr. & Sm. 355; 143 R. R. 156.

(*n*) *Cooper v. Hubbuck*, 1860, 30 Beav. 160; *Weatherley v. Ross*, 1862, 1 H. & M. 349; 36 L. J. Ch. 128.

(*o*) 1861, 11 C. B. N. S. 283; 31 L. J. C. P. 110.

(*p*) 1862, 12 C. B. N. S. 826; 31 L. J. C. P. 342.

(*q*) *Tapling v. Jones*, 1865, 11 H. L. C. 290; 34 L. J. C. P. 342; 145 R. R. 192.

Extinguishment of continuous easements implied from alteration of user.

Tapling v. Jones.

fore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover, the absolute and indefeasible right which is the creation of the statute is not subject to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to retard the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated. . . ." He could not accept the reasoning on which the decisions in *Renshaw v. Bean* and *Hutchinson v. Copestake* were founded. "Upon examining the judgments in those cases, it would be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed ; and the Court asks whether he can complain of the natural consequence of his own act. Thus two erroneous assumptions are involved in or underlie this reasoning : first, that the act of opening the new windows was a wrongful one ; and secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute." His Lordship's opinion was that the defendant's wall, so far as it obstructed the access of light to the plaintiff's ancient unaltered window, was an illegal act from the beginning.

Lord Cranworth gave similar reasons for his judgment, and expressed his dissent from the reasoning in *Renshaw v. Bean*.

Lord Chelmsford said that he did not see that the defendant's case would be benefited if it were established, contrary to the express words of the statute, that the right to the enjoyment of light rested on the footing of a grant. He stated the law to be that the right acquired by user must necessarily be confined to the exact dimensions of the opening through which the access of light and air had been permitted. As to anything beyond, the parties possessed exactly the same relative rights which they had before. The owner of the privileged window did nothing unlawful if he enlarged it, or made a new window in a different situation. The adjoining owner was at liberty to build upon his own ground so as to obstruct the addition to the old window, or shut out the new one ; but he did not acquire his former right of obstructing the old window, which he had lost by acquiescence, nor did the owner of the old window lose his absolute and indefeasible right to it, which he had gained by length of user. The right continued uninterruptedly until some unequivocal act of intentional abandonment was done by the person who had acquired it, which would remit the adjoining owner to the unrestricted use of his own premises. "It will, of course," he said, "be a question in

each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and, should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval. For a right once abandoned is abandoned for ever." But a person, by endeavouring to extend a right, could not manifest an intention to abandon it; he evinced his determination to retain it, and acquire something more. And the enlarging an ancient window would be no cause of forfeiture, because the act was not unlawful. He thought *Renshaw v. Bean* could not be supported.

Extinguishment of continuous easements implied from alteration of user.

Tapling v. Jones.

The decision of the House of Lords in *Tapling v. Jones* (r) has been uniformly followed since it was given (s). With respect, however, to its bearing on earlier decisions, it has been pointed out by Sir A. Hobhouse, when delivering the judgment of the Privy Council (t), that the plaintiff in *Tapling v. Jones* succeeded in getting protection for nothing but his old lights; and that it may be inferred from the judgments that if the plaintiff had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. "It is true," it was said, "that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights."

In *Colls v. Home Stores* (u) it was laid down (as we have seen) that an obstruction to be actionable must amount to a nuisance. Since that decision it seems that an increase in the size of an ancient window will not increase the burden of the servient tenement, seeing that any obstruction which would be a nuisance to the enlarged window would a fortiori have been a nuisance to the original window.

Present rule as to increase in size of ancient window.

(r) 1865, 11 H. L. C. 290; 34 L. J. C. P. 342; 145 R. R. 192.

(s) Cf. *Martin v. Headon*, 1866, 2 Eq. 425, at p. 433; 35 L. J. Ch. 602; *Staught v. Burn*, 1869, 5 Ch. 163; 39 L. J. Ch. 289; *Newson v. Pender*, 1884, 27 Ch. D. 43; *Scott v. Pape*, 1886, 31 Ch. D. 554; 55 L. J. Ch. 426; *Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437. See *Colls v. Home Stores*, 1904, A. C. 189; 73 L. J. Ch. 484; *Hyman v.*

Van den Bergh, 1908, 1 Ch. 176; 77 L. J. Ch. 154. And the plaintiff obtaining an injunction in such a case will not be put upon the terms of restoring his windows to their original position (*Aynsley v. Glover*, 1875, 10 Ch. 287; 44 L. J. Ch. 523).

(t) *Frechette v. La Compagnie*, 1883, 9 App. Cas. 186; 53 L. J. P. C. 20.

(u) Ante, p. 295.

Extinguishment of continuous easements implied from alteration of user.

Decrease in size of ancient window.

Ankerson v. Connelly.

The further question arises whether the easement will be lost by decreasing the size of an ancient window. This kind of question was raised in *Ankerson v. Connelly* (x), where an easement of light had been acquired in respect of ancient windows, but the dominant tenement was amply lighted by means of light other than that which came through the ancient windows. The defendant, who was the dominant owner, rebuilt his tenement so as practically to exclude all light other than that coming through the ancient windows. The plaintiff, who was the servient owner, erected an obstruction which prevented any access of light to the ancient windows, which obstruction the defendant pulled down. The plaintiff thereupon applied for a declaration that the defendant was not entitled to any easement of light over the plaintiff's land. The evidence showed that after the rebuilding the plaintiff's obstruction would materially interfere with the access of light to the defendant's ancient windows, whereas before the rebuilding it would not have caused such an interference as, since *Colls' Case*, would have justified an injunction. In the result the plaintiff succeeded. The Court of Appeal laid down that in the case of alteration there must be substantial identity between the altered premises and the old ones before the protection of ancient lights can be obtained, and held that as a matter of fact the reconstruction had destroyed this identity. They also held that what the servient owner did would not have been the subject of an injunction prior to the alterations made by the dominant owner.

Since *Ankerson v. Connelly* the question has been further considered in *Bailey v. Holborn* (y). That was a case, not of the dominant owner decreasing the size of his window, but of his consenting to an obstruction of light coming over adjoining property, and by which obstruction his light had been diminished. From the judgment of Sargant, J. (z), it seems that in his opinion a decrease by the dominant owner in the size of his window would not entirely negative his right to an easement of light, though it would not give him any further right so as to prevent the erection of a building which he could not have prevented had the size of the window not been decreased.

The difficulty in these cases arises in defining and applying under the altered circumstances the rights of the owner of the old easement. And it has been pointed out that in many cases where lights have been altered it may, since *Colls v. Home Stores*, be a matter of

(x) 1906, 2 Ch. 544 ; 1907, 1 Ch. 678 ; 515.
76 L. J. Ch. 402.

(y) 1914, 1 Ch. 598 ; 83 L. J. Ch.

(z) 1914, 1 Ch. p. 602.

extreme difficulty to show that an interference with light is capable of legal remedy, having regard to the great difficulty of showing whether what is existing under the present conditions would have been a nuisance under the conditions formerly existing (*a*).

Extinguishment of continuous easements implied from alteration of user.

The dominant owner is strictly speaking entitled to his old easement, but to nothing more. And if in any particular case the evidence enables the Court to distinguish between the interference which, having regard to his old easement, the dominant owner can prevent, and that which he cannot prevent, the old easement can be protected accordingly. If, however, the evidence does not enable the Court to make this distinction—in other words, if it be impossible to sever any increased burden—then the question will arise whether the old easement has or has not been lost. In *Ankersen v. Connelly Warrington, J.*, decided that in such a case the old easement had been lost; but the Court of Appeal refused to deal with the question (*b*).

Ankersen v. Connelly.

Alterations may be made, not only in the size or area of a window, but in its plane and inclination; and the question whether an alteration of this latter kind would suffice to extinguish an easement of light has been much discussed. It is now settled that alterations of this kind stand on the same footing as alterations of size, and do not, unless they are of such a character as substantially to change the nature of the easement (*c*), amount to abandonment.

Alteration of plane of window

Thus, in *National Co. v. Prudential Co.* (*d*) a building containing ancient lights had been pulled down and rebuilt; and the old dormer window of three faces, which lighted the ground floor, had been converted into a skylight partially co-extensive with the old window, but of a different shape. The defendants having obstructed the light to this skylight, the plaintiffs brought their action. On the motion for an injunction Jessel, M.R., while refusing the interlocutory injunction on the ground that the obstruction was complete before action brought, expressed his opinion that the easement formerly belonging to the ground floor window had not been lost; for, although the plane or direction of the glass had been altered, the aperture remained substantially the same (*e*). At the trial, Fry, J.,

National Co. v. Prudential Co.

(*a*) *Andrews v. Waite*, 1907, 2 Ch. 510; 76 L. J. Ch. 676, where the evidence enabled the Court to surmount this difficulty.

(*b*) 1906, 2 Ch. 549; 1907, 1 Ch. 682; 76 L. J. Ch. 402. See the opinion of Mr. Gale quoted ante, p. 470.

(*c*) See below, p. 479.

(*d*) 1877, 6 Ch. D. 757; 46 L. J. Ch.

871.

(*e*) His Lordship also thought that the windows in the upper floors, which had been set back about five feet eight inches, were no longer the same windows so as to retain their right to light; but it appeared on the hearing that these windows were not affected by the defendant's building, and the case

Extinguishment of continuous easements implied from alteration of user.

Alteration of plane of window.

National Co. v. Prudential Co.

awarded damages for the obstruction of the ground floor window. "It is said that the access of light to the dwelling-house must be identical, and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now in its breadth that proposition is not true, because the case of *Tapling v. Jones* has shown that you may destroy the identical aperture by taking away the surrounding lines of that aperture and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light, and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement (f). I come to that conclusion for this reason:—that you do not want a statute to give you a right of access in your own premises to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement. But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because of course the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all the cases the Court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement."

Barnes v. Loach.

To the same effect is *Barnes v. Loach* (g), where a wall containing ancient windows had been set back, and windows had been made in the new wall of the same size and in the same relative positions as those in the old wall, but in a different plane; and it was held that the right to light remained. It was also held in the same case that the dominant owner had not, by erecting a wall and a window in it, outside and at an angle with an ancient window, lost the easement of light attached to the ancient window.

cannot therefore be regarded as a decision on this point. See and consider the cases next quoted.

(f) Since *Colls v. Home Stores*, 1904, A. C. 179; 73 L. J. Ch. 484, expressions to this effect must not be taken literally,

but must be taken to refer to the right as defined by that decision; and see *Ambler v. Gordon*, 1905, 1 K. B. 417; 74 L. J. K. B. 185.

(g) 1879, 4 Q. B. D. 494; 48 L. J. Q. B. 756.

Again, in *Bullers v. Dickinson* (*h*) the plaintiff's premises stood on the site of an old toll-house which had projected obliquely into the street, and had enjoyed an easement of light for the windows on the ground floor; the toll-house had recently been pulled down, the site of the projecting part being sold for widening the street, and the plaintiff's premises being forthwith erected on the remainder. The plaintiff's ground floor window, for which he claimed protection, was substantially on the same level as the old window; but it stood further back, and, of course, at a different angle to the street. On an action being brought to restrain an interference with the new window, the defendant objected that the plaintiff had lost or abandoned his right; but Kay, J., overruled the objection.

Extinguishment of continuous easements implied from alteration of user.

Alteration of plane of window

Bullers v. Dickinson.

In *Scott v. Pape* (*i*) the whole question as to the effect of an alteration in a building was fully considered. The plaintiff, who was the owner of buildings having ancient lights looking into a lane, had pulled down his buildings within twenty years before action brought, and erected larger buildings on the site. The new buildings contained windows on all the floors. Parts of six windows on the first floor of the new building occupied a large portion of the area formerly covered by three ancient lights; and for this portion of such area the plaintiff claimed protection. It was a material element in the case that the plaintiff, in rebuilding, had slightly advanced his wall into the lane, the gain varying from a foot to three feet five inches. Upon these facts North, J., who heard the action, declined to infer abandonment, and granted an injunction "restraining the defendant from permitting to remain erected any wall, &c., so as to darken, injure, or obstruct any of the ancient lights of the plaintiff's premises, as the same were enjoyed by means of those portions of the windows on the first floor of the plaintiff's old buildings which had not been blocked up in the rebuilding of the plaintiff's premises." This was affirmed by the Court of Appeal. Cotton, L.J., after referring to s. 3 of the Prescription Act, continued: "What alteration, then, will deprive the plaintiff of his right,—this right which can be claimed only in respect of a dwelling-house, workshop, or other building? Will the alteration of the purpose or object for which the building is to be used, as the conversion of a workshop into a house, or of a house into a workshop, have this effect? It will not: that is definitely settled by the case of *Ecclesiastical Commissioners v. Kino* (*k*). The old building there

Scott v. Pape.

(*h*) 1885, 29 Ch. D. 155; 54 L. J. Ch. 426.
776.

(*k*) 1880, 14 Ch. D. 213; 49 L. J. Ch.

(*i*) 1886, 31 Ch. D. 554; 55 L. J. Ch. 529.

Extinguishment of continuous easements implied from alteration of user.

Alteration of plane of window.

Scott v. Pape.

was a church, and that which was to be built on the site of the church was a warehouse—an entire alteration of the purposes and of the character of the building. Then will moving back the plane of the wall deprive the plaintiff of his right? In my opinion, no. It is difficult to see how the mere fact of moving back can do so; and in fact there is authority against such a proposition. Then, if moving it back will not, will simply moving it forward have this effect? In my opinion, both the moving back and the moving forward may destroy the right, because the new building, when constructed, may, either by being substantially advanced or substantially set back, be so placed that the light which formerly went into the old windows will not go into the new. If a building is set back say 100 feet, it will not enjoy the same cone of light that was enjoyed before, but will have an entirely different cone; and it may be moved so far forward that it will not enjoy the same light as that enjoyed by the old building. In my opinion, the question to be considered is this, whether the alteration is of such a nature as to preclude the plaintiff from alleging that he is using through the new aperture in the new wall the same cone of light, or a substantial part of that cone of light, which went to the old building. If that is established, although the light must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part or the whole of the light which went through the old aperture.” Bowen, L.J., developing the same principle, said: “The measure of the enjoyment and the measure of the right acquired are, not the windows and apertures themselves, which would involve a continuing structural identity of the windows, but the size and position of the windows, which necessarily limit and define the amount of light which arrives ultimately for the house’s use.” Fry, L.J., added his opinion that the “access of light” referred to in the Prescription Act was, not access through the aperture or window, but access or freedom of passage over the servient tenement; and that the “right thereto,” which is by the statute rendered “absolute and indefeasible,” is a right to the same access and use of light to and for *any* dwelling-house, workshop, or other building. The Act, he said, was silent as to identity of aperture, as it was silent as to identity of building.

The above judgments are misleading in so far as they suggest that the right acquired under the Prescription Act is a right to the whole of “that particular light which has come to” a building (*l*). As has been already seen, since the decision in *Colls v. Home Stores* (*m*)

(*l*) See per Lord Macnaghten, ¹1904, A. C., at p. 189.

(*m*) 1904, A. C. 179; 73 L. J. Ch. 484; above, p. 295.

it is established that the right acquired is a right only to freedom from nuisance by obstruction. With this qualification the decision in *Scott v. Pape* has put the law as to the effect upon an easement of light of an alteration in the dominant tenement on a clear and definite footing; and it must now be taken that, if and so long as the dominant tenement continues to enjoy the same or some part of the same light formerly enjoyed, no abandonment will be inferred (*n*). "It seems to me that the question which has to be determined is, whether proof is necessary of identity of the window or aperture through which the light claimed has been admitted to the dominant building, or whether the true matter for investigation is the identity of the light which has been so admitted. . . . I think the real test is, as I said before, identity of light and not identity of aperture, or entrance for the light" (*o*).

But where the encroachment is such that none of the existing windows can be said substantially to correspond with an ancient window, even though part of the space occupied by each may be identical, no difficulty arises; and, as it cannot be proved that any window in respect of which a right had been acquired has been in fact obstructed, abandonment may be inferred (*p*). The case of *Hutchinson v. Copestake* (*q*), above quoted, may be referred to this principle, and, so interpreted, may stand even without *Renshaw v. Bean*. And to the same effect are *Heath v. Bucknall* (*r*), where the new windows did not cover more than one-fourth of the former area, and the opinions of the judges in *Newson v. Pender* (*s*), where the whole question was discussed.

In any case, it is essential to the preservation of the right that the dominant owner, when effecting the alteration, should preserve clear and definite evidence of the size and position of the former windows (*t*).

Reference may here be made to some older cases in which a plaintiff who obscured the light of his house, but left a substantial part unaffected, was not thereby disentitled to an injunction (*v*).

(*n*) *Greenwood v. Hornsey*, 1886, 33 Ch. D. 471; 55 L. J. Ch. 917; *Smith v. Baxter*, 1900, 2 Ch. 138; 69 L. J. Ch. 437; *Andriess v. Waite*, 1907, 2 Ch. 500; 76 L. J. Ch. 676; cf. *Raper v. Fortescue*, 1886, W. N. 78; *Re London and Tilbury R. Co.*, 1889, 24 Q. B. D. 326; 59 L. J. Q. B. 162.

(*o*) *Andrews v. Waite*, 1907, 2 Ch. 500, per Neville, J., at p. 509; 76 L. J. Ch. 676.

(*p*) *Pendarves v. Monro*, 1892, 1 Ch. 611; 61 L. J. Ch. 404; cf. *Ankerson v.*

Connelly, 1906, 2 Ch. 544; 1907, 1 Ch. 678; 76 L. J. Ch. 402.

(*q*) 1861, 9 C. B. N. S. 863; 127 R. R. 905.

(*r*) 1869, 8 Eq. 1; 38 L. J. Ch. 372.

(*s*) 1884, 27 Ch. D. 43.

(*t*) *Fowlers v. Walker*, 1881, 49 L. J. Ch. 598; 51 L. J. Ch. 443; *Scott v. Pape*, ubi sup.; *Pendarves v. Monro*, 1892, 1 Ch. 611; 61 L. J. Ch. 494.

(*u*) *Arcedeckne v. Kolk*, 1858, 2 Giff. 683; 128 R. R. 228; *Staigt v. Burn*, 1869, 5 Ch. 163; 35 L. J. Ch.

Extinguishment of continuous easements implied from alteration of user.

Alteration of plane of window.

Present rule as to inferring abandonment.

Clear evidence required as to former apertures.

Extinguishment of continuous easements implied from alteration of user.

Restoration after alteration.

Civil law.

Upon the question whether a party who has lost his rights by altering his tenement is still at liberty to restore his tenement to its former condition and recur to his former enjoyment it would seem on principle that the party so altering his tenement would have no such right, as he would have clearly evinced an intention to relinquish his former mode of enjoyment (*x*). And in addition to the actual encroachment, the uncertainty caused by the attempted extension of the right would of itself impose a heavier burden upon the owner of the servient tenement, if such return to the original right were permitted.

By the civil law, where a man had a right of way, and used it in a mode not warranted by the grant, although he committed a trespass on his neighbour, the right of way was not lost (*y*). But a roof could not be lowered so as to make the servitus stillicidii more burdensome (*z*).

III. Of the Extinguishment of Discontinuous Easements by the Dominant Owner ceasing or altering the User.

III. Extinguishment of discontinuous easements implied from cessation or alteration of user.

And first as regards cessation of user. There seems to be no doubt that discontinuous easements may be lost by mere non-user, provided such cessation to enjoy be accompanied by the intention to relinquish the right. From the very nature, however, of the enjoyment, and from the circumstance that the cessation to enjoy may take place without any alteration in the dominant tenement, it must

602; *Bourke v. Alexandra Co.*, 1877, W. N. 30; *Dyers' Co. v. King*, 1870, 9 Eq. 438; 39 L. J. Ch. 339.

(*x*) See the judgment of Lord Chelmsford in *Tapling v. Jones*, 1865, 11 H. L. C. 319; 34 L. J. C. P. 342; 145 R. R. 192; the judgment of Pollock, C.B., in *Jones v. Tapling*, 1862, 12 C. B. N. S. 864; 31 L. J. C. P. 342. See also *Moore v. Rawson*, 1824, 3 B. & C. 332; 5 D. & R. 234; 3 L. J. K. B. 32; 27 R. R. 375; *Garritt v. Sharp*, 1835, 4 Nev. & M. 834; 3 A. & E. 325; *South Metropolitan Cemetery Co. v. Eden*, 1855, 16 C. B. 42; 100 R. R. 608.

(*y*) Is cui via vel actus debebatur, ut vehiculi certo genere uteretur, alio genere fuerit usus: videamus, ne amiserit servitutem; et alia sit ejus conditio, qui amplius oneris, quam licuit, vexerit; magisque hic plus, quam aliud, egisse videatur—sicuti si latiore itinere usus esset, aut si plura jumenta egerit, quam licuit, aut aquæ admiscuerit aliam. Ideoque in omnibus istis quæ-

tionibus servitus quidem non amittitur: non autem conceditur plus, quam pactum est, in servitute habere.—Dig. 8, 4, 11, quem. serv. amit.

(*z*) Si antea ex tegulâ cassitaverit stillicidium, postea ex tabulato, vel ex aliâ materiâ, cassitare non potest.—Dig. 8, 2, 20, § 4, de serv. præd. urb.

Stillicidium, quoquo modo adquisitionem sit, altius tolli potest; levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum directum, nec perveniet ad locum servientem—inferius demitti non potest, quia fit gravior servitus, id est, pro stillicidio flumen. Eâdem causâ, retro duci potest stillicidium, quia in nostro magis incipiet cadere; produci non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est; lenius facere poterimus, acrius non. Et omnino sciendum est—meliolem vicini conditionem fieri posse, deteriolem non posse; nisi aliquid nominatim, servitute imponenda, immutatum fuerit.—Ib. § 5.

always be difficult to lay down any precise rule to determine when a cessation of user shall be taken to have the characteristics requisite to make it amount to an abandonment of the right.

In considering this part of the subject two questions appear to arise :—

1st. Supposing there to have been simply a cessation of user, has the law presented any fixed period to raise the presumption of a release or abandonment of the easement ?

2ndly. If any such period be fixed, can a shorter period suffice, if there be clear evidence of intention to relinquish the right ?

Lord Coke appears to have been of opinion, that when a title by prescription was once acquired, it could only be lost by non-user during a period equal to that required for its acquisition. “ It is to be known that the title being once gained by prescription or custom cannot be lost by interruption of the possession for ten or twenty years ” (a).

At this time the analogy to the statute of James I. had not been introduced into the law.

In *Doe v. Hilder* (b) Lord Tenterden, in delivering the judgment of the Court, said : “ One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of such land ; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right,—in the latter a release of it, is presumed.”

Littleale, J., in the case of *Moore v. Rawson* (c), though he did not cite the above authority, expressed an opinion in accordance with it, that easements of this character could only be lost by cessation of enjoyment during twenty years ; the learned judge distinguished between these easements and a right to light and air, principally on the ground that the former, as far as their acquisition by prescription was concerned, could only be acquired by enjoyment accompanied with the consent of the owner of the land, while the

Extinguishment of discontinuous easements implied from cessation of user.

Co. Litt.

Doe v. Hilder.

Moore v. Rawson.

(a) Co. Litt. 114 b.

(c) 1824, 3 B. & C. 339 ; 3 L. J.

(b) 1819, 2 B. & Ald. 791 ; 21 R. R. K. B. 32 ; 27 R. R. 373.

Extinguishment of discontinuous easements implied from cessation of user.

Moore v. Rawson.

enjoyment of the latter required no such consent, and could only be interfered with by some obstruction. "According to the present rule of law, a man may acquire a right of way or a right of common (except, indeed, common appendant) upon the land of another by enjoyment; after twenty years' adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege granted to him, it may then be presumed he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that, as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of release; and this reasoning, perhaps, may apply to a right of common or of way."

Holmes v. Buckley.

In *Holmes v. Buckley (d)*, where there had been a grant of a water-course through two pieces of land, with a covenant by the grantor to cleanse the same, the Court decreed the party claiming the land under the grantor to cleanse the stream, although the grantee had cleansed it at his own expense during forty years.

The precise period requisite to extinguish a right of way, by mere non-user, does not appear to have been determined by any express decision of the English Courts (*e*); but it is said to have been decided in an American case, "that a right of way is not lost by non-user for less than twenty years" (*f*).

The following cases elucidate the doctrine that a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment.

Cessation of user unaccompanied by indications of intention to abandon.

Payne v. Shedden.

In *Payne v. Shedden (g)* issue was taken upon a plea of right of

(*d*) 1691, 1 Eq. Cas. Abr. 27; there are some observations on this case, as bearing on the law of covenants running with the land, in *Austerberry v. Corporation of Oldham*, 1885, 29 Ch. D. 750; 55 L. J. Ch. 633, at pp. 777, 782.

(*e*) In *Bower v. Hill*, 1835, 1 Bing. N. C. 555; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630, Tindal, C.J., said that an obstruction to a way of a permanent character, if acquiesced in for twenty years, would be evidence of a renunciation and abandonment of the right of way. Cf. *Drewett v. Sheard*, 1836, 7 C. & P. 465; 48 R. R. 797. But in *Cook v. Eath*, 1868, 6 Eq. 177, Malins, V.-C., held that thirty years' non-user, without more, was insufficient

to extinguish a right of way.

(*f*) *Emerson v. Wiley*, 10 Pickering, R. 310. Some of the American Courts have held that an easement, to be extinguished by disuse, must have been acquired by use; but there is no authority for this proposition in English law. See also Angell on Water-courses, § 250 to § 252, and the observations of Joy, C.B., 1 Jones' Exch. Rep. (Ir.) 123.

(*g*) 1834, 1 Mood. & R. 382; 42 R. R. 808. The defendant failed in establishing any right of way. See also *Hale v. Oldroyd*, 1845, 14 M. & W. 789; and *Carr v. Foster*, 1842, 3 Q. B. 581; 11 L. J. Q. B. 284; 61 R. R. 321.

way ; and it appeared that, by agreement of the parties, the line and direction of the way used had been varied, and at certain periods wholly suspended. Patteson, J., was of opinion that the occasional substitution of another track might be considered as substantially the exercise of the old right and “evidence of the continued enjoyment of it,” and that the suspension by agreement was not inconsistent with the right.

Extinguishment of discontinuous easements implied from cessation of user.

Payne v. Shelden.

In *R. v. Chorley (h)* the defendants were indicted for obstructing a public footway by driving carts in a lane through which there was a public footway. The lane was so narrow that carts could not pass without damage to persons on foot. The defence was that the defendants had a private right of way with carts, &c., to a malthouse, &c., situated in the lane, and that the public right of footway had been acquired subsequently to the private right, and was qualified by or subject to it (*i*) ; and the question was, whether the privilege was extinguished by the acquiescence of the owners in the user of the way by the public—a user which was inconsistent with its use as a cartway by the defendants. The learned judge at the trial told the jury that nothing short of twenty years’ user by the public, in a way inconsistent with the private user, would destroy the right. The Court, on making a rule absolute for a new trial for misdirection, after saying, that “if the learned judge had done no more than remark that if a mere ceasing to use the private way, or a mere acquiescence in the interruption by the public, were relied on, it would be prudent not to rely on such mere cessation or acquiescence unless shown for twenty years, it would have been no misdirection,” proceed as follows : “As an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without reference to time. For example, this being a right of way to the defendant’s malthouse, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed his malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable time acquiesced in the new use, we conceive the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the

R. v. Chorley.

(h) 1848, 12 Q. B. 515 ; 76 R. R. 330. Q. B. 330 ; 66 R. R. 429 ; *Morant v. Chamberlin*, 1861, 6 H. & N. 541 ; 30 1840, 1 Man. & G. 484 ; *Elwood v. Bullock*, 1844, 6 Q. B. 383 ; 13 L. J. L. J. Ex. 299 ; 123 R. R. 672.

Extinguishment of discontinuous easements implied from cessation of user.

R. v. Chorley.
Ward v. Ward.

intention in him which either the one or the other indicates, which are material for the consideration of the jury" (*k*).

In *Ward v. Ward* (*l*) a right of way was held not to have been lost by mere non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. Alderson, B., said: "The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user."

Lovell v. Smith.

In *Lovell v. Smith* (*m*) the owner of a right of way had, about thirty years before the action, agreed with the servient owner to use, in lieu of part of the old way, a new way over the servient owner's land, and therefore he discontinued to use the old way, and used the new. The Court held that the mere non-user of the old way and the user of the new one for more than twenty years, under such circumstances, furnished no evidence of an intention to abandon the old right.

Cook v. Bath.

In *Cook v. Bath* (*n*) there had formerly been a right of way through a back door, which had been closed for thirty years, and then opened and used for four years before the obstruction. Malins, V.-C., held that there had been no abandonment. He says: "It is always a question of fact, to be ascertained by the jury or the Court from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such. If in this case the defendants had commenced building before the door had been reopened, I should have been of opinion that the plaintiff had, by allowing it to so remain closed, led them into incurring expense, and therefore could not prevent them acting on the impression that he intended to abandon his right."

James v. Stevenson.

In *James v. Stevenson* (*o*) it was held that mere non-user of some of the roads over which a right of way existed, where no occasion for user had arisen, coupled with the use by the servient owner of those parts of the roads for farm purposes, did not constitute abandonment; and to the same effect is *Cooke v. Ingram* (*p*).

(*k*) The Court, it will be seen, expressed no distinct opinion on the point left open in *Stokoe v. Singers*, ante, p. 464; but in the latter case Lord Campbell said, that "*The Queen v. Chorley* is an authority that an abandonment is effectual if communicated and acted on; it goes no further." See ante, p. 60, as to *Perry v. Fitzhowe*.

(*l*) 1852, 7 Ex. 838; 21 L. J. Ex. 334; 86 R. R. 852.

(*m*) 1857, 3 C. B. N. S. 120; 111 R. R. 572. See *Hulbert v. Dale*, 1909, 2 Ch. 570; 78 L. J. Ch. 457.

(*n*) 1868, 6 Eq. 177.

(*o*) 1893, A. C. 162; 62 L. J. P. C. 51.

(*p*) 1893, 68 L. T. 671.

In *Midland R. Co. v. Gribble* (q), where, on the intersection of land by a railway, a crossing had been provided for the purpose of communication between the severed parts, it was held that, on the alienation by the owner of the part on one side of the railway without reserving any right of way over it, the right to use the crossing was finally abandoned.

Extinguishment of discontinuous easements implied from cessation of user.

Midland R. Co. v. Gribble.

Young v. Star Co.

In *Young v. Star Co.* (r), the plaintiffs claimed, and were held entitled to, a right of way over a strip of land ten feet wide in the occupation of the defendants. Some years prior to the commencement of the action the plaintiffs erected on their land a summer-house which projected over the strip of land to the extent of two feet four inches. The defendants having obstructed the way, this action was brought, and the defendants pleaded extinguishment or abandonment on the part of the plaintiffs. It was held that the erection of the summer-house was at best only a partial abandonment, and constituted no defence to the action.

In *Hall v. Swift* (s), where it appeared that about forty years since a stream of water from natural causes ceased to flow in its accustomed course, and did not return to it until nineteen years before the action was brought, the Court held that the right to the flow of water was not lost. "It is further objected," said Tindal, C.J., "that the right claimed has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only recommenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff had no control. But it would be too much to hold that the right is, therefore, gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be" (t).

Watercourse.
Hall v. Swift.

In *Crossley v. Lightowler* (u) the plaintiffs were carpet manufacturers, and had carried on business on the banks of the river Hibble from 1840 to 1864. A supply of pure water was necessary for their business. The defendants claimed a right to foul the stream with the refuse of dye-works, which had been carried on before 1839, but had then been shut up and abandoned, and reopened by the defendants in 1864. Wood, V.-C., said: "The question of abandon-

Crossley v. Lightowler.

(q) 1895, 2 Ch. 827; 64 L. J. Ch. 826.

(r) 1902, 86 L. T. 41.

(s) 1838, 6 Scott, 167; 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728. See observations on this case by Patteson, J., in *Carr v. Foster*, 1842, 3 Q. B. 586; 11 L. J. Q. B. 284;

61 R. R. 321. *Hall v. Swift* is, however, a case, not of an easement, but of a natural right.

(t) Cf. *Hale v. Oldroyd*, 1845, 14 M. & W. 789; 15 L. J. Ex. 4; 69 R. R. 824.

(u) 1866, 3 Eq. 279.

Extinguish-
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discontinuous
easements
implied from
cessation
of user.

*Crossley v.
Lightowler.*

ment, I quite concede to the counsel for the defendants, is a very nice one. On that a great number of authorities have been cited, which appear to me to come to this, that the mere non-user of a privilege or easement of this description is not in itself an abandonment that in any way concludes the claimant; but the non-user is evidence with reference to abandonment. The question of abandonment is a question of fact, that must be determined upon the whole of the circumstances of the case. . . . It has always been held to be of considerable importance that a person in possession of a certain right, and leaving the right wholly unused for a long period of time, and having given so far an encouragement to others to lay out their money on the assumption of that right not being used, should not be allowed at any period of time to resume his former right, to the damage and injury of those who themselves have acquired a right of user which the recurrence to this long-disused easement will interfere with." On appeal (*x*) Lord Chelmsford, L.C., said: "The authorities upon the question of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may render it necessary for the person claiming the right to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it. The question of abandonment of a right is one of intention to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *R. v. Chorley* (*y*) shows that time is not a necessary element in a question of abandonment, as it is in the case of the acquisition of a right." His Lordship, on the facts, held that, the ancient dye-works having been dismantled without any intention of erecting others, the right had been abandoned, and that the case put by Holroyd, J., in *Moore v. Rawson* (*z*) exactly applied.

Civil law.

So, by the civil law, where a right of this kind was lost by the fountain drying up, it was held to revive as soon as the fountain burst forth again (*a*).

(*x*) 1867, 2 Ch. 478; 36 L. J. Ch. 584.

(*y*) 1848, 12 Q. B. 515; 76 R. R. 330.

(*z*) 1824, 3 B. & C. 332, 338; 3 L. J. K. B. 32; 27 R. R. 375; above, p. 481.

(*a*) Hi, qui ex fundo Sutirino aquam ducere soliti sunt, adierunt me, proposueruntque—aquam, qua per aliquot annos usi sunt, ex fonte, qui est in fundo Sutirino, ducere non potuisse, quod fons

exaruisset; et postea ex eo fonte aquam fluere cœpisse; petieruntque (*a*) me—ut, quod jus non negligentia aut culpâ suâ amiserant, sed quia ducere non poterant, his restitueretur. Quorum mihi postulatio cum non iniqua visa sit, succurrendum his putavi. Itaque quod jus habuerunt tunc, cum primum ea aqua pervenire ad eos non potuit, id eis restituere placet.—Dig. 8, 3, 35, de serv. præd. rust.

Where, however, there has not been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, as by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right, would at all events be strong evidence, and in effect almost conclusive, that he never had any such right.

In *Norbury v. Meade* (b) the Lord Chancellor said: "In the case of a right of way over the lands of other persons, being an easement belonging to lands, if the owner chooses to say 'I have no right of way over those lands,' that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed."

Extinguishment of discontinuous easements implied from cessation of user.

Cessation of user accompanied by indications of intention to abandon.

Norbury v. Meade.

In *Harvie v. Rogers* (c), where a public right of way was claimed in Scotland, Lord Eldon said: "It was contended in argument that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of trial. But it is quite impossible to maintain a position of that kind; for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right by successive obstructions, although these obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a court of justice. I apprehend that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in." It is evident this language cannot be taken literally, that no amount of non-user would be sufficient to defeat a right of way once fully established. The obvious meaning of Lord Eldon was, that where acts of interruption are proved as evidence that the right has ceased, the material inquiry must be, whether such acts of interruption were known and acquiesced in.

Harvie v. Rogers.

A question upon this point under the Prescription Act was suggested in the first edition, "Whether, in all cases where an easement is claimed by prescription, the user must possess all the qualities requisite to confer a title down to the very commencement

Whether Prescription Act superseded previous methods of claiming easements.

(b) 1821, 3 Bligh, 241.

(c) 1828, 3 Bligh, N. S. 447; 32 R. R. 121.

Extinguish-
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implied from
cessation
of user.
Effect of
Prescription
Act on
previous
methods of
claiming
easements.

of the suit; and therefore, although the right may have clearly existed at an earlier period, it is destroyed by a subsequent user not possessing those essential qualities" (*d*). It has been already seen that, by the statute, the period of user to acquire an easement must be that immediately preceding the commencement of an action (*e*); and if the statute had been held to be obligatory in all cases upon parties to proceed under it many ancient rights would have been lost on grounds which at the common law would have been insufficient to produce that result, and which the Legislature, in framing the statute, did not appear to contemplate. As, for example, where, within the period requisite to confer an easement, there has been a unity of possession of the dominant and servient tenements, no right under the statute can be acquired according to the cases cited, ante, p. 182; and supposing the right to be ancient, the incidental operation of the statute would have been, in such a case, to destroy it. So of any other failure of the requisite qualities of the user.

Another anomaly would also have arisen as to the mode of losing an easement, which would be different in the case of an easement claimed by express grant and by prescription. Thus, a right of way by express grant would not be determined by unity of possession, as it would have been if claimed by prescription.

This inconvenience has been obviated by considering this as an affirmative statute, which does not take away the common law (*f*). In *Onley v. Gardiner* (*g*), where the defendant failed in proving a sufficient title under the statute in consequence of a unity of possession, the Court allowed the defendant to amend by pleading a right by prescription generally. In *Richards v. Fry* (*h*), where it was suggested in argument that "If a party had a right three years ago, which he released, and then an action was brought against him for a trespass committed before the release, if he pleads according to the letter of the statute, i.e., a user for thirty years before the commencement of the suit, he would be defeated, although the act in question was perfectly justifiable at the time," Patteson, J., observed: "He might not be able to avail himself of the statute, but he would have a defence at common law."

In accordance with this view, statements occur in several recent cases to the effect that the Prescription Act has not taken away any of the methods of claiming easements which existed before that Act

(*d*) See, e.g., *Hyman v. Vanden Bergh*, 1907, 2 Ch. 516; *affd.*, 1908, 1 Ch. 167; 77 L. J. Ch. 154 (a case of light).

(*e*) See ante, p. 200.

(*f*) Bacon, Ab. Stat. G

(*g*) 1838, 4 M. & W. 496; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704.

(*h*) 1838, 3 Nev. & P. 72; 7 A. & E. 698; 7 L. J. (N. S.) Q. B. 68; 45 R. R. 816.

Onley v.
Gardiner.

Richards v.
Fry.

was passed. The rule has been so laid down by Mellish, L.J., in *Aynsley v. Glover* (i), by Lord Blackburn in *Dalton v. Angus* (k), by Stirling, J., in *Smith v. Barter* (l), and by Lord Lindley in *Gardner v. Hodgson* (m). Again, as regards profits à prendre, Lord Hatherley in 1871 (n) held that rights of common could be established by prescription at common law independently of the statute.

Extinguishment of discontinuous easements implied from cessation of user.

The language of the House of Lords in *Tapling v. Jones* (o) suggests that in their opinion the old methods had been (at least in the case of light) merged in the new statutory right. In *Hyman v. Van den Bergh* (p), Farwell, L.J., speaking for himself alone, referred to these judgments, and laid down that in cases where a defence relating to the "agreement" mentioned in s. 3 or the "interruption" mentioned in s. 4 was applicable, the plaintiff could not evade the Act by setting up any of the modes of claim other than that conferred on him by the statute. This dictum, however, seems inconsistent with the broad language of the statements above referred to. And it should be pointed out that not only in *Warrick v. Queen's College* (q), but also in *Norfolk v. Arbutnot* (r), where defences relating to the "interruption" mentioned in s. 4 were suggested, the older methods of claim were treated as being available to a plaintiff.

By the civil law, the same period was fixed for the loss of a prædial servitude by non-user as for its original acquisition by enjoyment—ten years where both parties were present, twenty when either was absent—and, until this full period has elapsed, the servitude, though, owing to some alteration in the dominant tenement, it has ceased to exist for a series of years, might at any time revive by the two tenements being restored to their original relative position: thus, a right of way, interrupted by alienation of a portion of the dominant tenement, revived upon its repurchase (s); so, too, the servitude "altus non tollendi" revived, if the intervening buildings were pulled down.

Civil law.

Extinguishment of servitude by cessation of user.

To lose an urban servitude, as already seen, some act of the owner of the servient tenement was also required. Where the servitude

(i) 1875, 10 Ch. 285; 44 L. J. Ch. 523.

(k) 1881, 6 App. Cas. 814; 50 L. J. Q. B. 689.

(l) 1900, 2 Ch. 14; 69 L. J. Ch. 437.

(m) 1903, A. C. 238; 72 L. J. Ch. 558.

(n) *Warrick v. Queen's College*, 1871, 6 Ch. 728; 40 L. J. Ch. 780.

(o) 1865, 11 H. L. C. 304, 310, 318; 34 L. J. Ch. 342; 145 R. R. 192.

(p) 1908, 1 Ch. 176; 77 L. J. Ch.

154.

(q) *Supra*.

(r) 1880, 5 C. P. D. at p. 392; 49 L. J. C. P. 782.

(s) Si quis ex fundo, cui viam vicinus deberet, vendidisset locum proximum servienti fundo, non impositâ servitute; et intra legitimum tempus, quo servitutes pereunt, rursus eum locum adquisisset, habiturus est servitutem, quam vicinus debuisset.—Dig. 8, 6, 13, quem. serv. amit.

Extinguishment of discontinuous easements implied from cessation of user.

was only to be used at fixed intervals, exceeding a day, the periods of prescription for the loss by non-user were prolonged to twenty and forty years. Any user within that time, however, in the right of the dominant tenement, whether by the owner, occupier, or their friends, servants, or guests, was sufficient to preserve the servitude (*t*).

The period of twenty years was fixed as the limit, by a constitution of Justinian, for the loss, by non-user, of a right of way which was only to be exercised for one day, at intervals of five years (*uno tantummodo die per quinquennium*), great doubts having previously existed upon this point amongst jurists (*u*). The period for losing by non-user, as well as that for acquiring servitude by enjoyment, might be made up from the time of the occupation or ownership of successive persons—both the acquisition and loss having respect to the tenement, and not to the person (*x*).

Extinguishment of discontinuous easements implied from alteration of user.

Next, as regards the extinguishment of discontinuous easements by the dominant owner altering the mode of user, whether such alteration is or is not accompanied by an alteration of the dominant tenement.

In addition to the cessation of enjoyment as a means of losing a discontinuous easement there remains to be considered the ques-

(*t*) *Sicut usumfructum, qui non utendo per biennium in soli rebus, per annale autem (tempus) in mobilibus vel se moventibus diminuebatur, non passus sum hujusmodi sustinere compendiosum interitum, sed ei decennii vel viginti annorum dedimus spatium: ita in cæteris servitutibus obtinendum esse censuimus, ut omnes servitutes non utendo amittantur, non biennio, (quia tantummodo soli rebus annexæ sunt,) sed decennio contra præsentem, vel viginti spatio annorum contra absentes: ut sit in omnibus hujusmodi rebus causa similis, explosis differentiis.—Cod. 3, 34, 13, de serv. et aq.*

Si sic constituta sit aqua, 'ut vel æstate ducatur tantum, vel uno mense,' queritur, quemadmodum non utendo amittatur: quia non est continuum tempus, quo cum uti non potest, non sit usus. Itaque et si alternis annis vel mensibus quis aquam habeat, duplicato constituto tempore amittitur. Idem et de itinere custoditur: si vero 'alternis diebus, aut die toto, aut tantum nocte,' statuto legibus tempore amittitur: quia una servitus est. Nam et si alternis horis, vel una hora quotidie servitutem habeat, Servius scribit, perdere eum, non utendo, servitutem:

quia id, quod habet, cottidianum sit.—Dig. 8, 6, 7, quem. serv. amit.

Postremo finitur (servitus) etiam non utendo—si videlicet nemo servitute usus sit, neque is cui debetur, neque possessor prædii dominantis amicusve aut hospes: cæterum ita si nemo usus sit servitute per constitutum continuum tempus, quod tempus est decem vel viginti annorum. Enimvero si servitutis usus continuum aut quotidianum tempus non habeat, fortè quia alternis annis aut mensibus constituta est, duplicato constituto tempore non utendo amittitur, id est adversus præsentem viginti annis, adversus absentes quadraginta. Idemque et in longioribus intervallis pro ratione et facultate utendi, statuendum. Quicumque vero aut nostro ut prædii nomine usus sit, possessor, mercenarius, hospes, amicus, colonus, fructuarius, retinebimus servitutem.—Vinnius, Comm. ad. Inst. Lib. 2, tit. 3, quibus modis serv. amittantur, § 6.

(*u*) Cod. 3, 34, 14, de serv. et aq.

(*x*) Tempus, quo non est usus præcedens fundi dominus, cui servitus debetur, imputatur ei, qui (in) ejus loco successit.—Dig. 8, 6, 18, § 1, quem. serv. amit.

tion of the effect of excessive user, which corresponds to encroachment in the case of continuous easements.

In the case of discontinuous easements the previously existing right will not be affected by acts of excessive user or usurpation, if (as is usually the case) the extent of the excess can be ascertained. Thus, if a party having a right of footway were to use it as a carriage-way, though he might thereby become liable to an action for such trespass, he might nevertheless sustain an action for any disturbance of his footway. The right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement.

In *Harris v. Flower* (y) the excessive user by which it was attempted to impose an additional burden on the servient tenement consisted in the use of a right of way for obtaining access to buildings erected partly on the land to which the right of way was appurtenant and partly on other land. A claim was put forward on behalf of the plaintiffs that the right of way had been abandoned, on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. This contention failed, however, the Court holding that there had been no abandonment, but that the user of the way for access to the buildings so far as they were situate upon land to which the right of way was not appurtenant was in excess of the rights of the defendants, and a declaration was made accordingly, with liberty to apply.

It may, however, happen that an alteration of the dominant tenement accompanied by a claim to use an easement in excess of the old right will result in its suspension or extinguishment. In *Milner v. G. N. & City R. Co.* (z), the case of a right of way, a house which was the dominant tenement had been pulled down and a railway station erected on the site, and a claim by the dominant owner to use the way for access to the station failed. It was further argued for the servient owner that the dominant tenement had been so altered that the dominant owners could not help exceeding the right if they used it at all, and, the good user not being severable from the excess of user, the right was suspended. The Court gave effect to the argument, saying: "It may be correct to say that the right is suspended, for I suppose it is capable of being revived, but what I hold is that it is not under present circumstances exercisable at all."

Extinguishment of discontinuous easements implied from alteration of user.

Where encroachment can be separated..

Harris v. Flower.

Milner v. G. N. & City R. Co.

(y) 1905, 91 L. T. 816; 74 L. J. Ch. 127.

(z) 1907, 1 Ch. 215, 227, 228; 75 L. J. Ch. 807. See also, as to the extinguishment of a right of way by

alteration of the dominant tenement, *Allan v. Gomme*, 1840, 11 A. & E. 772; 9 L. J. (N. S.) Q. B. 258; 52 R. R. 492; *Henning v. Burnet*, 1852, 8 Ex. 191; 22 L. J. Ex. 79; 91 R. R. 427.

Extinguishment of discontinuous easements implied from alteration of user.

Milner v. G. N. & City R. Co.

So, again, where a person who has a right to send down clean water through a drain sends down foul water, so that it is impossible to sever the good user from the excessive user, the servient owner may stop the whole discharge (a). Where, however, a right has been acquired to pollute water by a certain manufacture, it was said that the right would not be destroyed by altering the materials used (b).

(a) *Cawkwell v. Russell*, 1856, 26 L. J. Ch. 34; *Charles v. Finchley*, 1883, 23 Ch. D. 775; 52 L. J. Ch. 554; *Hill*

v. Cock, 1872, 26 L. T. 185.

(b) *Baxendale v. MacMurray*, 1867, 2 Ch. 794.

PART VI.

OF THE DISTURBANCE OF EASEMENTS.

CHAPTER I.

WHAT AMOUNTS TO A DISTURBANCE.

THERE is a clear distinction as to the foundation of the right of action for a private nuisance, properly so called, and an action for the disturbance of an easement (*a*). No proof of any right, in addition to the ordinary right of property, is required in the case of the former. To maintain an action for a disturbance of an easement to receive air by a window, proof of the accessorial right must be given ; but it is otherwise where an action is brought for corrupting the air, or establishing an offensive trade. Yet the incidents of the two classes of rights, as far as concerns the remedies for any infringement of them, are similar. "A man has no need to prescribe to do a thing which he may do of common right, as to distrain for rent, rent service, &c. ; or if I would prescribe that, when a man builds a house so that from his house the water runs upon my land, I have been used to abate that which causes the water to run upon my land, this prescription is void, for by the common law I can do that as well" (*b*). In many cases an action may be founded on both these rights ; thus, in *Aldred's Case* (*c*) the plaintiff complained of the stoppage of his windows, and that the defendant had erected a wooden building, and kept hogs therein, by means of which his easement of light was obstructed, and his enjoyment of his messuage diminished by the smell of the hogs. Both injuries are called nuisances, and the same principles as to the nature of the remedies for them apply indiscriminately to both.

Distinction between rights of action for a nuisance and for disturbance of an easement.

Aldred's Case.

It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance ; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached,

(*a*) 1611, 9 Rep. 58 b. See discussion as to the strict meaning of the term "nuisance," ante, p. 393.

(*b*) Per Choke, J., 8 Edw. 4, 5, pl. 14 ; *Tenant v. Goldwin*, 1705, 1 Salk. 360.

(*c*) 1611, 9 Rep. 57 b.

Must be some sensible diminution of enjoyment.

although it is not necessary that there should be a total obstruction of the easement. The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved.

Disturbance of water-courses.

Thus, it is said in *Aldred's Case*: "If A. makes a watercourse, running in a ditch from the river to his house, for his necessary use, if a Glover sets up a lime-pit for calf-skins and sheep-skins, so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged, 13 Hen. 7, 26."

So, the driving of stakes into a watercourse, or otherwise diverting it, whereby I can no longer have sufficient water for my mill (*d*); even if the stream be choked up for want of cleansing (*e*), or by the roots of trees growing into it (*f*). Or an action will lie for affixing a small pipe, and thereby taking water from a larger one (*g*), or for diverting part of the water only (*h*), or for opening a drain into a sewer made by another on my land under a reservation of right to make it for the purpose of carrying off his drainage (*i*).

"Item," says Bracton, "si quis aliquid fecerit quominus ad fontem, &c., ire possit, vel haurire, vel de fonte aquæ non tantam aquam ducere vel haurire, tales cadere possunt in assisam" (*k*).

A case is mentioned by Mr. Starkie (*l*) of an action brought for the disturbance of a watercourse, where it appeared that the water, after being used for irrigation, was returned to the natural channel; and Wood, B., nonsuited the plaintiff. As, however, it was shown that a portion of the water was lost by irrigation and absorption, the Court of King's Bench is reported to have set aside the nonsuit.

Disturbance of private rights of way.

As regards the disturbance of private rights of way, it has been laid down that in a public highway any obstruction is a wrong if appreciable, but in the case of a private right of way the obstruction is not actionable unless it is substantial (*m*). Again, it has been said that for the obstruction of a private way the dominant owner

(*d*) 2 Rolle, ubi sup., pl. 8, 9.

(*e*) *Bower v. Hill*, 1835, 1 Bing. N. C. 549; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630.

(*f*) *Hall v. Swift*, 1838, 6 Scott, 167; 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728.

(*g*) *Moore v. Dame Browne*, 1572, Dyer, 319 b, pl. 17.

(*h*) Anon., Dyer, 1566, 248 b, pl. 80; see also *R. v. Tindall*, 1837, 6 A. & E.

143; 6 L. J. (N. S.) M. C. 97; 45 R. R. 426.

(*i*) *Lee v. Stevenson*, 1858, E. B. & E. 512; 27 L. J. Q. B. 263; 113 R. R. 752.

(*k*) Bracton, Lib. 4, ff. 233.

(*l*) 2 Evid., 2nd ed., 9, 11, note.

(*m*) *Petty v. Parsons*, 1914, 2 Ch. 662. See *Pullin v. Deffel*, 1891, 64 L. T. 134.

cannot complain unless he can prove injury ; unlike the case of trespass, which gives a right of action though no damage be proved (*n*). In *Hutton v. Hambro* (*o*), where the obstruction of a private way was alleged, Cockburn, C.J., laid down that the question was whether practically and substantially the right of way could be exercised as conveniently as before. It must not be forgotten that the grant of a private way ordinarily speaking confers only a right to a reasonable use of the way by the grantee in common with others (*p*) ; and the question what is a reasonable use has been said to be a question for the jury (*q*). In deciding what is a substantial interference with the dominant owner's reasonable user of the way all the circumstances must be considered. Thus, the reciprocal rights of the persons entitled to use the way have been discussed (*r*) ; also the case of persons carrying burdens along the way (*s*). Certain acts by the servient owner have been held to be obstruction, *e.g.*, building on the way (*t*) ; or ploughing up the way, which makes it not so easy as it was before (*u*).

With respect to the particular disturbance of a private right of way caused by the servient owner erecting a gate across the way, the following dictum by Jones, J., occurs in his report of *James v. Hayward* (*x*) : " If a private man has a way across the land of J. S. by prescription or grant, J. S. cannot make a gate across the way ; and if on a private way a gate cannot be made a multo fortiori, it cannot be made on a highway which would be prejudicial to many." In *Andrews v. Paradise* (*y*) the plaintiff recovered judgment against the defendant for breach of covenant for quiet enjoyment, the breach consisting of the erection of a gate across a way. The case was argued on demurrer, which admitted the plaintiff's allegation that the defendant had erected a gate across the way per quod the plaintiff's tenant was obstructed. In *Kidgill v. Moor* (*z*) a declara-

(Gates.

(*n*) *Thorpe v. Brumfitt*, 1873, 8 Ch. 656. See *Sketchley v. Berger*, 1893, 69 L. T. 755 ; *Jones v. Llannest*, 1911, 1 Ch. 893 ; 80 L. J. Ch. 145.

(*o*) 1860, 2 F. & F. 218 ; 121 R. R. 787.

(*p*) *Clifford v. Hoare*, 1874, 9 C. P. 371 ; 43 L. J. C. P. 225. See *Harding v. Wilson*, 1823, 2 B. & C. 96 ; 1 L. J. K. B. 238 ; 26 R. R. 287 ; *Strick v. City Offices*, 1906, 22 Times L. R. 667.

(*q*) *Hawkins v. Carbines*, 1857, 27 L. J. Ex. 46 ; 114 R. R. 1002.

(*r*) *Shoesmith v. Byerley*, 1873, 28 L. T. 550. And see especially the remarks of Jessel, M.R., as to reasonable user, in *Original Hartlepool Co. v.*

Gibb, 1877, 5 Ch. D. 72 ; 46 L. J. Ch. 311 (a case of access to a public highway).

(*s*) *Austin v. Scottish Widows*, 1881, 8 L. R. Ir. 385.

(*t*) *Lane v. Capsey*, 1892, 3 Ch. 411 ; 61 L. J. Ch. 55. See *Phillips v. Treeby*, 1862, 3 Giff. 632 ; 13 R. R. 209.

(*u*) 2 Rolle, Ab., Nusans, G. 1. See *Nicol v. Beaumont*, 1884, 50 L. T. 112.

(*x*) 1631, Sir W. Jones, 222 ; Cro. Car. 184. The words of Jones, J., do not occur in Croke's report.

(*y*) 1725, 8 Mod. 318.

(*z*) 1850, 9 C. B. 364 ; 19 L. J. C. P. 177 ; 82 R. R. 364.

tion by the plaintiff (owner in reversion of the dominant tenement) against the defendant for fastening a gate made across a private way was held good after verdict.

Modern cases have placed the law on a clearer footing. It has been laid down in the Court of Appeal in England that a gate is not necessarily an interference with a private right of way. To be actionable the interference must be substantial (*a*). And it has been laid down in Ireland that whether a gate is or is not an interference with the right is a matter of fact (*b*). In both the last-mentioned cases the erection of a gate across a private way was held to be no interference with the right, proper facilities being given to the dominant owner (*c*). If a gate across a private way is locked, it is no answer to a complaint of the obstruction to say that keys will be supplied (*d*).

Disturbance
of light.

To maintain an action for obstructing light it is not sufficient to show that the light is less than before. The plaintiff must show that the obstruction complained of is a nuisance (*e*). The measure of the right to light laid down by the House of Lords and the matters to which the Court should have regard in deciding the question of nuisance or no nuisance have already been stated and discussed (*f*). In particular it has been pointed out that the Court should have regard to light coming from sources other than that which has been obstructed, but only so far as this other light is light which the dominant owner is entitled by grant of prescription to enjoy (*g*).

Assuming, for example, a room having windows in walls facing both east and west, the windows in either wall being amply sufficient to light the room without the assistance of the light coming through the windows in the other wall; assuming, also, the windows in the eastern wall to have enjoyed the access of light for more than twenty years, and those in the western wall to have been open for less than the statutory period. In such a case, in an action for obstruction to the ancient windows in the eastern wall, could regard be had to the light enjoyed through the windows in the western wall, of which the owner of the building would be liable to be deprived at any moment? The answer to this question should, in accordance with the words of

(*a*) *Petty v. Parsons*, 1914, 2 Ch. 666, 662.

(*b*) *Flynn v. Harle*, 1913, 2 I. R. 327.

(*c*) See also *Deacon v. S. E. R. Co.*, 1889, 61 L. T. 377, where the erection of gates across a private right of way was held justifiable. Numerous American authorities as to the erection

of gates across private ways are collected in American and English Encyclopædia of Law, vol. 23, p. 34.

(*d*) *Guest v. Milner*, 1911, 28 T. L. R. 59.

(*e*) *Colls v. Home Stores*, 1904, A. C. 179; 73 L. J. Ch. 484.

(*f*) See ante, pp. 296 et seq.

(*g*) See ante, p. 298.

the judges referred to above (*h*), be in the negative. It should be pointed out, however, that in practice it may be difficult to limit the light coming from other sources to light to which the dominant owner has acquired a right. For such a qualification might and probably would involve questions of the rights of third persons. Moreover, as regards a claim to light under the Prescription Act, it is now settled that even after twenty years' enjoyment the right remains inchoate until some action is commenced in which the right is called in question (*i*).

It is no answer to an action for disturbance of light that the plaintiff has himself slightly diminished the light (*k*). But it is otherwise if the result of the plaintiff's act is to render the burden on the servient tenement more onerous; as, for example, if the plaintiff, by altering his premises, so diminishes the light coming to them by means other than through the ancient windows as to cause an obstruction, which before the alteration would have been immaterial, to effect a substantial diminution in his light (*l*).

As regards an apprehended injury to an easement or natural right, an injunction may be obtained in a *quia timet* action, but to succeed the plaintiff must show a strong case of probability that the apprehended mischief will in fact arise (*m*). Relief of this nature was referred to in some early cases. Thus, in 1617 it was said by Croke, J.: "If the boughs of your tree grow over my land, I may cut them off; but I cannot justify cutting them before they grow over my land, for fear they should grow over" (*n*). Again, it was said by Coke, C.J.: "Whether the defendant may pull down the nuisance before the house is made, and so come to be a nuisance—I do much doubt of this,—here, it is only said, the plaintiff conatus fuit to edifie this house, and rear up the timber; the defendant hath no hurt by this, for he may afterwards leave off again—the defendant is not to pull this down for the intent only. If one comes upon his own land, and intends to come upon my land, upon this imagination I am not to lay hands upon him. I never saw in any book a justification for a conation, because he did not do it" (*o*).

Apprehended
injury.
Actions
quia timet.

(*h*) Ante, p. 298.

(*i*) *Hyman v. Van den Bergh*, 1908, 1 Ch. 167; 77 L. J. Ch. 154.

(*k*) See *Arcedekne v. Kelk*, 1858, 2 Giff. 683; 128 R. R. 228; *Staight v. Burn*, 1869, 5 Ch. 163; 39 L. J. Ch. 289; *Barnes v. Loach*, 1879, 4 Q. B. D. 494; 48 L. J. Q. B. 756.

(*l*) *Ankerson v. Connelly*, 1906, 2 Ch. 554; 1907, 1 Ch. 678; 76 L. J. Ch. 402. See *Bailey v. Holborn*, 1914, 1 Ch. 602; 83 L. J. Ch. 515.

(*m*) *A.-G. v. Manchester*, 1893, 2 Ch. 92; 62 L. J. Ch. 459; *A.-G. v. Nottingham*, 1894, 1 Ch. 677; 73 L. J. Ch. 512. See *A.-G. v. Rathmines*, 1904, 1 I. R. 161; *Fletcher v. Bealey*, 1884, 28 Ch. D. 688; 54 L. J. Ch. 424.

(*n*) Per Croke, J., *Norris v. Baker*, 1617, 1 Rolle, Rep. 394.

(*o*) Per Coke, C.J., in S. C., 3 Bulstrode, 197, nom. *Morrice v. Baker*. See *Penruddock's Case*, 1738, 5 Rep. 101.

Although, generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done will be an injury to an easement, it is not a condition precedent to the exercise of the remedy that actual damage shall have accrued. Thus, if a party intending to build a house, which will obstruct my ancient lights, erect fences of timber for the purpose of building, I have no right to pull them down: “*cur nemo tenetur divinare*. But, if a house be built, the eaves of which project over my land, I need not wait till any water actually fall from them, but may pull them down at once” (*p*). So, too, it was admitted, in *Jones v. Powell* (*q*), “that an action did not lie for the fear of a nuisance merely; but it is otherwise where there is apparent cause for the fear, and, therefore, *metus et periculum*: for if a man waits until infection comes, it is too late to bring the action” (*r*). Mere threats, unaccompanied by any act, do not amount to a disturbance (*s*).

A similar rule existed in the civil law. If the work were completed, the natural consequence of which would be damage to the party complaining, he need not wait until such damage actually occurred (*t*).

Disturbance
of secondary
easements.

An action lies as well for a disturbance of the secondary easements, without which the primary one cannot be enjoyed, as for a disturbance of the primary easement itself. “Item,” says Bracton, “*si quis ire ad fontem prohibetur, habet actionem, ‘Quare quis obstruxit’; quia cui conceditur haustus, ei conceditur iter ad fontem et accessus*” (*u*).

(*p*) 2 Rolle, Ab. 145, Nusans, U.; R. acc. *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823. See *Pickering v. Rudd*, 1815, 4 Camp. 219; 16 R. R. 777; *Barker v. Green*, 1824, 2 Bing. 317; *Sampson v. Hoddnott*, 1857, 1 C. B. N. S. 590; 26 L. J. C. P. 148; 107 R. R. 809.

(*q*) 1628, Palmer, 536.

(*r*) *A.-G. v. Birmingham*, 1858, 4 Kay & J. 528; *Pattisson v. Gilford*, 1874, 18 Eq. 259; 43 L. J. Ch. 524; *Siddons v. Short*, 1877, 2 C. P. D. 572; 46 L. J. C. P. 795; *Cowley v. Byas*, 1877, 5 Ch. D. 944; *Phillips v. Thomas*, 1890, 62 L. T. 793. Damages are not recoverable for a fear that a nuisance will be continued (*Battishill v. Reed*, 1856, 18 C. B. 696; 25 L. J. C. P. 291;

107 R. R. 465; *Simpson v. Savage*, 1856, 1 C. B. N. S. 347; 26 L. J. C. P. 50; 107 R. R. 688).

(*s*) *Earl of Shrewsbury's Case*, 1738, 9 Rep. 46 b.

(*t*) *Hæc autem actio (aquæ pluvie arcendæ), locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur, totiensque locum habet, quotiens manu facto opere agro aqua nocitura est. Id est, cum quis manu fecerit, quo aliter fluere, quam naturâ solet. —Dig. 39, 3, 1, 1, de aq. et aq. pl. arc.*

(*u*) Lib. 4, ff. 233; *Race v. Ward*, 1857, 7 E. & B. 384; 26 L. J. Q. B. 133; 110 R. R. 637. And see *Peter v. Daniel*, 1848, 5 C. B. 568; 17 L. J. C. P. 177.

CHAPTER II.

REMEDIES FOR DISTURBANCE.

THE remedies for any disturbance of an easement are of two kinds :—(1) By act of the party aggrieved ; and (2) By act of law.

SECT. 1.—*Remedies by Act of the Party.*

“ Nota, reader,” says Lord Coke, “ there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment—that the nuisance shall be removed, cast down or abated, as the case requires ; or the party aggrieved may enter and abate the nuisance himself ” (*a*). Remedy by
act of party.

Abatement.

Bracton says that the remedy by act of the party must be taken without delay. “ Ea vero quæ sic levata sunt ad nocumentum injuriosum, vel prostrata vel demolita, statim et recenter flagrante maleficio, sicut de aliis disseisinis, demoliri possunt, et prosterni, vel relevari et reparari, si querens ad hoc sufficiat ; si autem non, recurrendum est ad eum qui jura tuetur, qui per tale breve remedium habebit ” (*b*).

Again, it was resolved by all the justices, “ that a man aggrieved by a nuisance may enter upon the land of another and abate the nuisance, by the common law, without prescription, and trespass will not lie against him either for the entry or abatement ” (*c*).

The following appears in the Year-books : “ If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch ” (*d*). Again, in an old case (*e*) it was decided “ That if water runs through the land of M., and he stops the water in his own close, so that it surrounds my land,

(*a*) *Baten's Case*, 1610, 9 Rep. 54 b ; *Perry v. Fitzhume*, 1845, 8 Q. B. 775 ; 15 L. J. Q. B. 239 ; 70 R. R. 626.

(*b*) Lib. 4, ff. 233 ; and vide ff. 233 b. According to Blackstone, 3 Com. 6, an abatement is lawful, because an immediate remedy is required ; but the right to abate is not confined to pressing cases, except perhaps where the nui-

sance consists only in omission. See per Best, J., in *Lonsdale v. Nelson*, 1823, 2 B. & C. at p. 311 ; 2 L. J. K. B. 28 ; 26 R. R. 363.

(*c*) Brooke, Ab., Nuisance, f. 102 b, pl. 33.

(*d*) 9 Edw. 4, 35.

(*e*) 8 Edw. 4, 5.

Remedy by
act of party.
Abatement.

*Wigford v.
Gill.*

I may enter on his close to remove the obstruction, and he shall not maintain an action."

J. S. erected a mill-dam, part upon his own land and part upon the land adjoining; the owner of the land adjoining pulled down the portion of the dam standing upon his land, by which all the dam fell down, and the water ran out. All the Court held it was justifiable. "So, if one erects a wall partly upon his own land and partly upon the land of his neighbour, and the neighbour pulls down the part of the wall upon his land, and therefore all the wall falls down, this is lawful" (f).

Rolle's Abridgment contains the following statements:—"If a man erects upon his own soil anything which is a nuisance to my mill, house or land, I may remain (estoier) on my own soil and throw it down. And so I may enter on his soil and throw down the nuisance, and justify this in action of trespass" (g). Again, "If a nuisance be made to my freehold, I may enter on his land (who made it) and deject the nuisance." Again, "If a man stops my way to my common, and incloses the common, I may justify the dejection of the inclosure of the common or way." Again, "If a nuisance be made to my land in which I have an estate for years, I may still deject the nuisance" (h).

*R. v.
Rosewell.*

So, in *R. v. Rosewell* (i), it is laid down: "If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down . . . and for this reason only, it is said, a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights."

*Raikes v.
Townsend.*

In *Raikes v. Townsend* (k), where the disturbance complained of was the obstruction of a rivulet, by means whereof the defendant's cattle could not obtain water so plentifully as before, and the defendant entered upon the soil of the plaintiff and abated the mill-dam, after judgment for the defendant, a motion was made to enter judgment for the plaintiff non obstante veredicto, which was overruled. The passages above cited from Rolle's Abridgment were relied on as an authority for confining the right to abate to the cases of nuisance to a mill, house, or land. Lord Ellenborough, C.J., said: "These cases are only put as instances."

Abatement
in case
of ways

In the case of private ways the Courts have recognized the common

(f) *Wigford v. Gill*, 1592, Cro. Eliz. 269.

(g) 2 Rolle, Ab., Nusans, S.

(h) *Ibid.* W.

(i) 1699, Salk. 459.

(k) 2 Smith, 9.

law right of the dominant owner to apply the remedy of abatement, and himself to remove an obstruction, even though it be a house which is inhabited (*l*). After abating, the dominant owner cannot bring an action (*m*); but, on the other hand, where the dominant owner brings an action and a mandatory injunction is refused, abatement may subsequently be allowed (*n*). And even where the obstructing house was in the possession of the Court's receiver leave to abate was given (*o*). Such leave will be granted unless it is clear that there is no foundation for the claim (*p*). The owner in fee of a dominant tenement can abate even if the tenement be in the occupation of a tenant (*q*). And the party in possession may abate although the nuisance existed before his entry (*r*).

Remedy by
act of party.
Abatement.

As regards an obstruction of a public highway, a private individual cannot abate it unless there be special injury (*s*); and he can only interfere so far as necessary for his right of passage—e.g., he can throw down a gate across a highway (*t*). It is doubtful whether the right to abate exists in the case of mere nonfeasance (*u*).

As regards rights of water; a party entitled to a watercourse may enter the land of a person who has occasioned a nuisance to a watercourse to abate it. But he can only interfere so far as his interference is positively necessary (*x*). And if there are two methods of abating he must choose the least mischievous (*y*). For he is bound to abate the nuisance in the most reasonable manner (*z*). In several cases abatements have been held reasonable (*a*).

Water.

Again, in the case of rights of light; if the servient owner erects a building so near the house of the dominant owner that it stops his lights, the dominant owner may enter upon the servient tenement and pull the building down (*b*).

Light.

No previous demand is requisite (*c*), except where the nuisance

Previous
request to
abate.

(*l*) *Lane v. Capsey*, 1891, 3 Ch. 411; 61 L. J. Ch. 35.

(*m*) *Baten's Case*, 1610, 9 Rep. 54 b.

(*n*) *Lane v. Capsey*, 1891, 3 Ch. 416;

61 L. J. Ch. 55.

(*o*) *Ibid*.

(*p*) *Randfield v. R.*, 1861, 3 D. F. & J. 771; 31 L. J. Ch. 113; 130 R. R. 328.

(*q*) *Proud v. Hollis*, 1822, 1 B. & C. 8.

(*r*) *Brent v. Haddon*, 1620, Cro. Jac. 555.

(*s*) *Bagshaw v. Burton*, 1875, 1 Ch. D. 224; 45 L. J. Ch. 260.

(*t*) *Campbell Davys v. Lloyd*, 1901, 2 Ch. 524; 70 L. J. Ch. 714, referring to *Dimes v. Petley*, 1850, 15 Q. B. 283; 19 L. J. Q. B. 449; 81 R. R. 573; *Colchester*

v. Brook, 1845, 7 Q. B. 377; 15 L. J. Q. B. 173; 68 R. R. 458; *Winterbottom v. Derby*, 1867, L. R. 2 Exch. 316; 36 L. J. Ex. 194.

(*u*) *Campbell Davys v. Lloyd*, *ubi sup*.

(*x*) *Roberts v. Rose*, 1865, L. R. 1 Exch. 89; 35 L. J. Ex. 62; 143 R. R. 516; *Greenlade v. Halliday*, 1830, 6 Bing. 379; 8 L. J. C. P. 124; 53 R. R. 241.

(*y*) *Roberts v. Rose*, *sup*.

(*z*) *Hill v. Cock*, 1872, 26 L. T. 186.

(*a*) E.g., *Roberts v. Rose*, *sup*.; *Macartney v. Londonderry Co.*, 1904, A. C. 301; 73 L. J. P. C. 73.

(*b*) *R. v. Rosewell*, 1699, 2 Salk. 459; *Thompson v. Eastwood*, 1852, 8 Ex. 69.

(*c*) *Perry v. Fitzhove*, 1846, 8 Q. B. 757; 15 L. J. Q. B. 239; 70 R. R. 626.

Remedy by
act of party.
Abatement.

cannot be abated without trespassing on the servient tenement, and such tenement is in the actual occupation of the owner (so that an abatement without notice is likely to lead to a breach of the peace) (*d*) or has passed into other hands since the erection. In the latter case, without such demand, the abatement would not be lawful; for the new occupant was not liable to a quod permittat before request made (*e*). But the demand may be made either on the lessor or lessee, for the continuance is a nuisance by the lessee, against whom an action well lies (*f*). Again, it has been laid down that notice before abatement is unnecessary either in case of emergency, or where the person in possession himself creates the nuisance (*g*).

Care in
abating.

In abating a private nuisance a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose (*h*) without injury to third parties (*i*).

But, in abating a public nuisance, it seems doubtful whether the same degree of caution is required (*k*). Thus, in *Lodie v. Arnold* (*l*), it is said "That the Court seem to agree that when H. has a right to abate a public nuisance, he is not bound to do it orderly and with as little hurt in abating it as can be." In the case of *James v. Hayward* (*m*) the defendant might have opened the gate without cutting it down, yet the cutting was lawful; and the Court denied *Hill's Case* (*n*), that matter of aggravation needed to be answered. It does not appear that the gate was fastened, but rather the contrary (*o*).

Distinguish *Burling v. Read*, 1850, 11 Q. B. 904; 19 L. J. Q. B. 291; 75 R. R. 662, where the defendant claimed a right to the soil. It is reasonable to give notice in every case: per James, L.J., in *Commissioners of Sewers v. Glassey*, 1872, 7 Ch. 464; 42 L. J. Ch. 345.

(*d*) *Davies v. Williams*, 1851, 16 Q. B. 546; 20 L. J. Q. B. 330; 83 R. R. 592; and *Lane v. Capsey*, 1891, 3 Ch. 411; 61 L. J. Ch. 35.

(*e*) *Penruddock's Case*, 1738, 5 Rep. 101; *Jones v. Williams*, 1843, 11 M. & W. 176; 12 L. J. Ex. 249; 63 R. R. 564; in which an exception is made in cases of immediate danger.

(*f*) *Brent v. Haddon*, 1620, Cro. Jac. 555.

(*g*) *Lemmon v. Webb*, 1894, 3 Ch. 13; 1895, A. C. 1; 64 L. J. Ch. 205.

(*h*) Com. Dig. Action on the Case for a Nuisance, D. 4; *Perry v. Fitzhowe*, 1846, 8 Q. B. 775; 15 L. J. Q. B. 239; 70 R. R. 626; *Greenslade v. Halliday*, 1830, 6 Bing. 379; 8 L. J. C. P. 124; 53 R. R. 241; *Davies v. Williams*, 1851, 19 Q. B. 556; 21 L. J. Q. B. 330; 83

R. R. 592, per Cur.

(*i*) *Roberts v. Rose*, 1865, L. R. 1 Exch. 82; 35 L. J. Ex. 62; 143 R. R. 516.

(*k*) In Comyns' Digest it is stated "That a man may justify pulling down a house with violence, whereby the materials are lost." The only authority cited for this position, if taken to mean that such damage may be caused by unnecessary violence, is the case of *Lodie v. Arnold*, which is an authority for it at all events only in the case of an abatement of a public nuisance.

(*l*) 1698, Salk. 458.

(*m*) 1631, Cro. Car. 184; Rolle, Ab., Nusans, T.; Sir W. Jones, R. 221, S. C.

(*n*) 1595, Cro. Eliz. 384.

(*o*) The origin of the doubt above expressed, whether the same care is required in abating a public and a private nuisance, appears to be the extra-judicial opinion which, in the passage above cited, is attributed to the Court in *Lodie v. Arnold*. That opinion appears from the context to have been founded on *James v. Hayward*. But in *James v. Hayward* the

In the case of *Lodie v. Arnold* it appears from the report that the materials of the house pulled down rolled into the sea, but not that the defendant threw them there. In *James v. Hayward* it is laid down, that "a (public) nuisance must be abated, in such a convenient manner as it can be; if a house be levied to the nuisance (of another), the whole house shall be abated; if a part, that part only shall be abated; but, as to the house, when the nuisance is abated, it is not lawful to destroy the materials, but they shall, after the abatement, remain to the owners of them, and to him who did the nuisance." According to *Rea v. Sheward* (p), goods wrongfully placed by the plaintiff on the defendant's land might lawfully be removed to and deposited on the plaintiff's own land; and an action of trespass was dismissed.

Remedy by act of party.
Abatement.
Disposal of materials.

SECT. 2.—*Remedies by Act of Law.*

The remedy by act of law for the disturbance of an easement is by an action in the High Court. Damages may be recovered. And the Court may grant a mandamus or an injunction "in all cases in which it shall appear to the Court to be just or expedient that such order should be made" (q).

Action in High Court.

By the County Courts Act, 1888 (r), as amended by the County Courts Act, 1903 (s), the County Courts have jurisdiction to try any action in which the title to an easement or licence comes in question, "where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over or under which such easement or licence is claimed, shall exceed the sum of one hundred pounds by the year." Where the defendant claimed to be entitled to a right in the nature

In County Court.

question was not as to the manner of abating the nuisance, but whether the gate was a nuisance, and, if so, could be abated. The opening of the gate would not have abated the nuisance. The modern precedents of justification on the ground of the removal of a public nuisance allege that no unnecessary damage was done by the defendant in the removal (see 3 Chit. on Pl. 6th ed. 1008); and in *Colchester v. Brooke*, 1845, 7 Q. B. 339; 15 L. J. Q. B. 173; 68 R. R. 458, the Court put the cases of private and public nuisances on the same footing with regard to the care to be used in removing them. According to the latter case, and *Dimes v. Petley*, 1850, 15 Q. B. 283; 19 L. J. Q. B. 449; 81 R. R. 573, an individual is not justified in abating a public nuisance, unless it does him a special injury;

and in the case of a nuisance in a public highway, "he can only interfere with it as far as is necessary to exercise his right of passing along the highway . . . and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." In *Bateman v. Bluck*, 1852, 18 Q. B. 876; 21 L. J. Q. B. 406; 88 R. R. 813, Lord Campbell, C.J., goes so far as to say that he cannot justify unless "there was no way in which he could exercise his right without the removal."

(p) 1837, 2 M. & W. 424; 6 L. J. (N. S.) Ex. 125; 46 R. R. 633.

(q) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25.

(r) 51 & 52 Vict. c. 43, s. 60.

(s) 3 Edw. 7, c. 42, s. 3.

Remedy by
action.

In Mayor's
Court.

of an easement as one of the public, so that there was no alleged dominant tenement, the above section did not apply (*t*).

The Mayor's Court has jurisdiction to deal with cases, no matter what the amount involved may be, where the whole cause of action arises within the City of London. "The words 'cause of action' have been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse" (*u*). By the Mayor's Court Procedure Act, 1857 (*v*), "Where the debt or damage claimed in any action shall not exceed the sum of £50, no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the City of London or the liberties thereof at the time of the action brought, or provided the defendant, or one of the defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein."

By s. 89 of the Jud. Act, 1873, the Mayor's Court (*x*) has power to grant injunctions and other relief, in cases within its jurisdiction, "in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

(a) *Parties to Actions.*

Who may
sue.

Parties entitled to sue.—As an easement is a benefit attached to the dominant tenement, the party in possession may sue for any interference with its enjoyment, even though such interference be of a temporary nature only.

Tenants.

An injunction to restrain an obstruction to light has been granted at the suit of a yearly tenant (*y*) and of a tenant whose lease had expired after the obstruction, but who had agreed to renew (*z*); and in *Jones v. Chappell* (*a*) Jessel, M.R., said that, so far as he was aware, it had never been decided that a weekly tenant could not have an injunction, and if a weekly tenant and his landlord were to join in a suit to restrain a nuisance, he would not find the slightest difficulty

(*t*) *Hawkins v. Rutter*, 1892, 1 Q. B. 668; 61 L. J. Q. B. 146. Where the plaintiff recovered only forty shillings damages for interfering with an easement, the action was properly brought in the High Court, and he was entitled to costs (*Howarth v. Sutcliffe*, 1895, 2 Q. B. 358; 64 L. J. Q. B. 729).

(*u*) *Cooke v. Gill*, 1873, L. R. 8 C. P. 107, at p. 116; 42 L. J. C. P. 98.

(*v*) 20 & 21 Vict. c. 157, s. 12.

(*x*) The Mayor's Court is an inferior Court (*Cox v. Mayor of London*, 1867, L. R. 2 H. L. 239).

(*y*) *Inchbald v. Robinson*, 1869, 4 Ch. 388.

(*z*) *Gale v. Abbot*, 1862, 8 Jur. N. S. 987; 131 R. R. 804.

(*a*) 1875, 20 Eq. 539; 44 L. J. Ch. 658.

in granting an injunction. In *Jacomb v. Knight* (*b*), where a yearly tenant filed a bill against adjoining tenants holding under the same landlord to restrain a slight obstruction to light, and the landlord after the filing of the bill gave the plaintiff notice to quit, so that at the time of the hearing less than eight months of the tenancy remained unexpired, Romilly, M.R., granted a mandatory injunction; but the Court of Appeal, taking into consideration the extent of the plaintiff's interest, and the balance of convenience and inconvenience, dismissed the bill without costs, and without prejudice to an action for damages. The owner of a house, who has no intention of residing there, may have an injunction against an obstruction to the windows simply on the ground of the effect of such an obstruction on the value of the property (*c*).

Who may sue.

It seems, accordingly, that an injunction to restrain a nuisance may be obtained by a tenant who holds by the year (*d*) or by the week (*e*). But in such a case the injunction may be limited to the duration of the plaintiff's tenancy (*f*), or may be refused without prejudice to a claim for damages (*g*). Tenants have been added as co-plaintiffs by amendment at the trial (*h*); and the occupiers of several houses affected by a nuisance have been joined as co-plaintiffs in an action to restrain it (*i*).

As regards occupiers, an action of trespass has been maintained by the occupier of oyster ponds (*k*), or by a person claiming foreshore under a possessory title (*l*), but not by a person only entitled to a building agreement in respect of the foreshore (*m*); nor could an action of trespass be maintained by an occupier of pasturage under a demise from a local authority which had no power to demise it (*n*), nor by the wife of a tenant of premises (*o*).

If the interference be injurious to the reversion, the reversioner may also have an action for the same disturbance (*p*).

Reversioners.

(*b*) 1863, 32 L. J. (N. S.) Ch. 601; 11 W. R. 812; 8 L. T. N. S. 621.

(*c*) *Wilson v. Tournend*, 1860, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 127 R. R. 124; *Goldsmid v. Tunbridge Wells*, 1866, 1 Ch. 355; 35 L. J. Ch. 382.

(*d*) *Inchbald v. Robinson*, 1869, 4 Ch. 388.

(*e*) *Jones v. Chappell*, 1875, 20 Eq. 539; 44 L. J. Ch. 658.

(*f*) *Simper v. Foley*, 1862, 2 J. & H. 555; 134 R. R. 337.

(*g*) *Jacomb v. Knight*, sup.

(*h*) *House Property Co. v. H. P. Horse Nail*, 1885, 29 Ch. D. 190; 54 L. J. Ch. 715.

(*i*) *Truman v. L. B. & S. C. R. Co.*, 1885, 29 Ch. D. 89; 54 L. J. Ch. 849.

See the earlier cases of *Hudson v. Maddison*, 1841, 12 Sim. 416; 11 L. J. Ch. 55; 56 R. R. 91; *Umfreville v. Johnson*, 1875, 10 Ch. 580; 44 L. J. Ch. 752. The joinder of plaintiffs now depends on R. S. C., Ord. 16, rr. 1 and 4.

(*k*) *Foster v. Warblington*, 1906, 1 K. B. 648; 75 L. J. K. B. 514.

(*l*) *Hastings v. Ivall*, 1874, 19 Eq. 558; 43 L. J. Ch. 738.

(*m*) *Laird v. Briggs*, 1881, 19 Ch. D. 22; 50 L. J. Ch. 260.

(*n*) *Coverdale v. Charlton*, 1878, 4 Q. B. D. 104; 48 L. J. Q. B. 128.

(*o*) *Malone v. Laskey*, 1907, 2 K. B. 141; 76 L. J. K. B. 1134.

(*p*) Com. Dig. Action on the Case for

Who
may sue.
Rights of
reversioner.
Year-books.

The action by a landlord for an injury to land in the possession of his tenant may be traced to very early times. There are several cases in the Year-books where such actions have been maintained, not only for a permanent damage or destruction of the land (*q*), but also for transient acts commencing and ending during the tenancy, but which occasioned loss to the landlord. Such acts are: ousting a tenant (*r*); menacing tenants at will, whereby they determined their tenancies (*s*); improperly setting up a court, and, by frequent distresses on the tenants for not attending the court, impoverishing them so that they were unable to pay their rent (*t*); fouling water with the refuse of a lime-pit, in which the defendant steeped calves' skins and sheep-skins, which caused the plaintiff's tenants to leave his houses (*u*); or, taking toll of a tenant who was exempt from toll (*x*).

Comyns'
Digest.

The rule laid down in Com. Dig., Action on the Case for a Nuisance, B., on the authority of *Bedingfield v. Onslow* (*y*) and *Jesser v. Gifford* (*z*), is, "If the nuisance is to the damage of the inheritance, he in the reversion shall have an action for it." The authorities relied on by the Court in *Bedingfield v. Onslow* were 19 Hen. 6, 45; 12 Hen. 6, 4; 2 Rolle, Ab. 551; and the following note of *Love v. Piggott*, Cro. Eliz. 55, "It was said there are divers precedents, that if a lessee for years be sued in *Court-Christian* for tythes, he in the reversion may have a prohibition."

Modern
authorities.

According to the modern authorities, an interference will be injurious to the reversion if (1) it be something which will in the future continue to the time when the reversion falls into possession,

a Nuisance, B.; *Jackson v. Pesked*, 1813, 1 M. & S. 234; 14 R. R. 417; *Alston v. Scales*, 1832, 9 Bing. 3; 1 L. J. (N. S.) M. C. 95; 35 R. R. 502. See also *Hopwood v. Scholfield*, 1837, 2 Mood. & R. 34; *Tucker v. Newman*, 1839, 11 A. & E. 40; 9 L. J. (N. S.) Q. B. 1; 52 R. R. 276; *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823; *Kidgill v. Moor*, 1850, 9 C. B. 364; 19 L. J. C. P. 177; 82 R. R. 364; *Metropolitan Association v. Petch*, 1858, 5 C. B. N. S. 504; 27 L. J. C. P. 330; 116 R. R. 740.

(*q*) As in 19 Hen. 6, 45, where land in the possession of a tenant at will was subverted by a stranger, and it was held that the tenant at will should have an action of trespass, because he could not have the profit of the land, and the landlord another action of trespass for the destruction of the land: Bro. Ab. Trespas. pl. 131; 2 Rolle, Ab. 551,

Trespas. N. pl. 3.

(*r*) 12 Hen. 6, 4.

(*s*) 9 Hen. 7, 7; 1 Rolle, Ab. 108, pl. 21; Com. Dig. Action on the Case for Mifeasance, A. 6; cited by Holt, C.J., *Keeble v. Hickeringill*, 1809, 11 East, 576; 11 R. R. 273, n.; *Bell v. Midland R. Co.*, 1861, 10 C. B. N. S. 307; 30 L. J. C. P. 273; 128 R. R. 719.

(*t*) *Earl of Suffolk's Case*, 13 Hen. 4, 11; 1 Rolle, Ab. 107, pl. 7; Com. Dig. Action on the Case for a Disturbance, A. 6; cited by Willes, J., *Bell v. Midland R. Co.*

(*u*) *Prior of Southwark's Case*, 13 Hen. 7, 26; cited by Wray, C.J., *Aldred's Case*, 1611, 9 Rep. 59 a.

(*x*) 43 Edw. 3, 29; 2 Rolle, Ab. 107, pl. 8.

(*y*) 1797, 3 Lev. 209.

(*z*) 1767, 4 Bur. 2141.

or if (2) it be something which in the present operates as a denial of the right of the reversioner.

Who
may sue.
Rights of
reversioner.

As regards the first head of injury, it was laid down by Cotton, L.J., that as a general rule a reversioner cannot get any damages for a wrongful act unless the damage is one which will endure and be continuing when the reversion becomes an estate in possession (a). And the rule has been more recently stated by Parker, J., as follows : " It is reasonably certain that a reversioner cannot maintain actions in the nature of trespass (including, I think, actions for infringement of natural rights arising out of his ownership of land) without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury : *Simpson v. Savage* (b). I take ' permanent,' in this connection, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule ; for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in their nature permanent within the rule, for they cease of themselves, unless there be some one to continue them. . . . It is not a case only of the present intention of the defendants, but of the necessary consequences of the physical conditions, if nothing is done to alter them " (c).

Under the second of the above heads of injury to the reversion there fall the following decisions. Where a reversioner sued on the ground that the defendant had erected a roof to the obstruction of an ancient light, Lord Tenterden held that the reversioner had a good cause of action, because it was an injury to the right ; and the effect of letting the obstruction stand might be that from the death of witnesses the evidence of its erection might be lost, and so the injury become permanent (d). In the case of the same obstruction a second action was brought for its continuance, and the Court held that if the erection were in the first instance an injury to the reversion the continuance must be so likewise. Such continuance would render the proof of the title more difficult at a future time. Lord

(a) *Rust v. Victoria Co.*, 1887, 36 Ch. D. 132.

(b) 1856, 1 C. B. N. S. 347 ; 27 L. J. C. P. 50 ; 107 R. R. 688.

(c) *Jones v. Llanruist*, 1911, 1 Ch. 404 ; 80 L. J. Ch. 1102, followed by Sargant, J., in *White v. Omnibus Co.*,

1914, W. N. 78. As to the meaning of " permanent," see *Shelfer v. City of London Co.*, 1895, 1 Ch. 299, 317 ; 64 L. J. Ch. 216.

(d) *Shadwell v. Hutchinson*, 1829, 3 C. & P. 615.

Who
may sue.
Rights of
reversioner.

Tenterden said in the first action that the injury might "become permanent," not that it was so; and the recovery of damages in the second action shows that judgment in the first was given for the past obstruction, not for its permanence (*e*). So, again, a reversioner could sue for obstruction to an ancient light caused by a hoarding which might have been put up "in denial of the plaintiff's right" (*f*). In such cases, said Jessel, M.R., there was an injury to the right which might be lost if the reversioner were not able to institute proceedings (*g*).

Again, it was said that such an obstruction, if acquiesced in for a sufficient time, would be evidence of the abandonment of the right (*h*). With this should be compared the case where a stranger entered on demised land in exercise of an alleged right of way, and it was said that such acts would be no evidence of right against the reversioner, who accordingly could not sue (*i*).

It seems doubtful whether a reversioner can sue for a wrongful act on the sole ground that such act lessens the selling value of the reversion (*k*).

Having regard to the above rules, the right of a reversioner to sue has been discussed in the case of actions for the disturbance of easements; in the case of actions for the disturbance of natural rights; and in the case of actions for trespass.

Of a reversioner's action for the disturbance of easements the books contain the following instances. Where ancient lights had been obstructed by the erection of a permanent structure, a reversioner had a good right of action (*l*). Again, where rights in respect of a watercourse had been disturbed, a reversioner sued (*m*). Again,

(*e*) *Shadwell v. Hutchinson*, 1831, 2 B. & Ad. 97; 9 L. J. K. B. 142; 36 R. R. 497.

(*f*) *Metrop. Assoc. v. Petch*, 1858, 5 C. B. N. S. 504; 27 L. J. C. P. 330; 116 R. R. 740.

(*g*) *Mott v. Shoolbred*, 1875, 20 Eq. 24; 44 L. J. Ch. 380.

(*h*) *Bower v. Hill*, 1835, 1 Bing. N. C. 555; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630.

(*i*) *Baxter v. Taylor*, 1832, 4 B. & Ad. 72; 2 L. J. (N. S.) K. B. 65; 38 R. R. 227.

(*k*) See, on the one hand, the opinion of Cotton, L.J., in *Rust v. Victoria Co.*, 1887, 36 Ch. D. 132; and, on the other hand, *Jesser v. Gifford*, 1767, 4 Burr. 2141; *Dobson v. Blackmore*, 1847, 9 Q. B. 1004; 16 L. J. Q. B. 233; 77 R. R. 493; and *Simpson v. Savage*,

1856, 1 C. B. N. S. 347; 27 L. J. C. P. 50; 107 R. R. 688.

(*l*) *Jesser v. Gifford*, 1767, 4 Burr. 2141; *Shadwell v. Hutchinson*, 1829, 3 C. & P. 615; S. C., 1831, 2 B. & Ad. 97; 9 L. J. K. B. 142; 36 R. R. 497; *Metrop. Assoc. v. Petch*, 1858, 5 C. B. N. S. 504; 27 L. J. C. P. 330; 116 R. R. 740; *Wilson v. Townend*, 1860, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 127 R. R. 124. See also the words of Jessel, M.R., in *Mott v. Shoolbred*, sup., and of Parker, J., in *Jones v. Llanrwst*, quoted sup.

(*m*) *Peter v. Daniel*, 1848, 5 C. B. 568; 17 L. J. C. P. 177; *Bedingfield v. Onslow*, 1797, 3 Lev. 219. See *Egremont v. Pulman*, 1829, 1 Mood. & M. 404; 11 L. J. Q. B. 319; 61 R. R. 335; *Bell v. Twentyman*, 1841, 1 Q. B. 766; 10 L. J. Q. B. 278; 55 R. R. 415.

where a private way had been permanently obstructed, a reversioner was held to have a good right of action (*n*).

Of a reversioner's action for the disturbance of natural rights there are also some examples. Where the water of a natural stream had been polluted (the right of purity being infringed), and the pollution would not cease unless and until something was done to divert it, a reversioner had a good cause of action (*o*). In the case of nuisances arising from noise and smoke, a reversioner was held to have no right of action on the ground that the nuisances might cease at any moment (*p*). But where a house was structurally injured by vibration caused by the adjoining owner, the reversioner could sue (*q*).

It is to be observed that in *Baxter v. Taylor* (*r*) Taunton and Parke, JJ., held that the act complained of would not be evidence of right against the reversioner; and that neither in *Mumford v. Orford*, &c., *R. Co.* nor in *Simpson v. Savage* was the act a disturbance of an easement (the onus of establishing which, if disputed, would be on the plaintiff), but an injury, not of a permanent kind, to a natural right. A natural right would *primâ facie* subsist after the determination of the term; and, unless the reversioner suffered the injurious acts to continue after the end of the term (*s*), they would not be likely to afford an obstacle, by way of evidence, to the maintenance of the right. For the evidence afforded by them might be rebutted by proof of the subsistence of the tenancy during the continuance of them; whereas in the case of the disturbance of an easement the proof of its existence is equally affected by acts of interference with the enjoyment of it, whether the dominant tenement has been under lease or not (*t*).

Who
may sue.
Rights of
reversioner.

(*n*) *Bower v. Hill*, 1835, 1 Bing. N. C. 549; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630; *Bell v. Midland R. Co.*, 1861, 10 C. B. N. S. 287; 30 L. J. C. P. 273; 128 R. R. 719. See *Hopwood v. Scholfield*, 1837, 2 Mood. & R. 34; *Kidgill v. Moor*, 1850, 9 C. B. 364; 19 L. J. C. P. 177; 82 R. R. 364. As to a reversioner suing in respect of rights connected with a public highway, see *Dobson v. Blackmore*, 1847, 9 Q. B. 1004; 16 L. J. Q. B. 283; 72 R. R. 493; *Mott v. Shoolbred*, 1875, 20 Eq. 22; 44 L. J. Ch. 380.

(*o*) *Jones v. Llanrwst*, 1911, 1 Ch. 404; 80 L. J. Ch. 1002.

(*p*) *Mumford v. Orford Co.*, 1856, 1 H. & N. 34; 25 L. J. Ex. 265; 108 R. R. 439; *Simpson v. Savage*, 1856, 1 C. B. N. S. 347; 27 L. J. C. P. 50; 107

R. R. 688; *Jones v. Chappell*, 1875, 20 Eq. 539; 44 L. J. Ch. 658; *Cooper v. Crabtree*, 1882, 20 Ch. 589; 51 L. J. Ch. 544; *House Property Co. v. H. P. Horse Nail*, 1885, 29 Ch. D. 190; 54 L. J. Ch. 715; *White v. London Omnibus Co.*, 58 Sol. J. 339.

(*q*) *Shelfer v. City of London Co.*, 1895, 1 Ch. 317; 64 L. J. Ch. 216; *Colewell v. St. Pancras*, 1904, 1 Ch. 707; 73 L. J. Ch. 275. See *Kirby v. Chessum*, 1914, 30 Times L. R. 660, where the reversioner's wall was in danger from adjoining excavation.

(*r*) 1832, 4 B. & Ad. 72; 2 L. J. (N. S.) K. B. 65; 38 R. R. 227.

(*s*) As to the effect of which, see *Palk v. Shinner*, 1852, 18 Q. B. 575; 22 L. J. Q. B. 27; 88 R. R. 703.

(*t*) See *Crump v. Lambert*, 1867, 3

Who
may sue.
Rights of
reversioner.

Lastly, as regards a reversioner's action for trespass. Where an adjoining owner had committed a trespass of a permanent nature by building a wall on the demised land the reversioner could sue (*a*). So where the defendant had built a wall on the demised land and placed timber thereon overhanging a yard (*b*). Again, where the adjoining owner had erected a roof with eaves projecting over the demised land and discharging rain-water on to it (*c*). In the case, however, of a simple trespass (as where a stranger entered in exercise of an alleged right of way) the reversioner had no right of action (*d*).

The following discussion of earlier decisions on the right of a reversioner to sue was contained in some of the former editions of this treatise, and is retained here.

To enable a reversioner to maintain the action, said Parke, J., "it was necessary for him to aver and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied by a claim of right, is not necessarily injurious to his reversionary interest" (*Baxter v. Taylor* (*e*)). *Baxter v. Taylor* was acted upon in *Simpson v. Savage* (*f*), in which the Court held that no action lies by a reversioner for a smoke nuisance caused by lighting fires in a factory and causing smoke to issue so as to be a nuisance to the reversioner's tenants and make them give notice to quit; and a very similar point was decided in *Mumford v. Oxford R. Co.* (*g*), where the complaint was for causing loud noises, and the Court held that the action would not lie (*h*). It would be foreign to the subject of this book to discuss the question how far these cases can be reconciled with the old authorities referred to by the Court in *Bell v. Midland R. Co.* (*i*) as to the right of action for causing tenants to leave their tenements. In both cases the Court relied upon the fact that the injury complained of was not of a permanent character, although unquestionably the repetition of

Eq. 409; *Johnstone v. Hall*, 1856, 2 K. & J. 414; 25 L. J. Ch. 462; 110 R. R. 296; *Mott v. Shoolbred*, 1875, 20 Eq. 22; 44 L. J. Ch. 380; *Jones v. Chappell*, 1875, 20 Eq. 539. *Cooper v. Crabtree*, 1881, 19 Ch. D. 193; 51 L. J. Ch. 544, where the reversioner failed, was a simple case of trespass.

(*a*) *Mayfair Co. v. Johnston*, 1894, 1 Ch. 508; 63 L. J. Ch. 399.

(*b*) *Jackson v. Pesked*, 1813, 1 M. & S. 234; 14 R. R. 417. See *Alston v. Scales*, 1832, 9 Bing. 3; 1 L. J. (N. S.) M. C. 95; 35 R. R. 502; *Raine v. Alderston*, 1838, 4 Bing. N. C. 702; 7 L. J. C. P. 273.

(*c*) *Tucker v. Newman*, 1839, 11 A. & E. 40; 9 L. J. (N. S.) Q. B. 1; 52 R. R. 276.

(*d*) *Baxter v. Taylor*, 1832, 4 B. & Ad. 72; 2 L. J. (N. S.) K. B. 65; 38 R. R. 227.

(*e*) 1832, 4 B. & Ad. 76; 2 L. J. (N. S.) K. B. 65; 38 R. R. 227.

(*f*) 1856, 1 C. B. N. S. 352; 27 L. J. C. P. 50; 107 R. R. 688.

(*g*) 1856, 1 H. & N. 34; 25 L. J. Ex. 265; 108 R. R. 439.

(*h*) See *Damper v. Bassett*, 1901, 2 Ch. 350; 70 L. J. Ch. 657.

(*i*) 1861, 10 C. B. N. S. 287; 30 L. J. C. P. 273; 128 R. R. 719.

such acts would furnish evidence against the reversioner, whether he might be able to rebut it or not. In *Kidgill v. Moor* (*k*) Maule, J., referring to the dictum of Parke, B., in *Baxter v. Taylor*, says: "My brother Parke does not say that it would not be evidence if the party claimed a right of way and meant to assert it"; and in *Tickle v. Brown* (*l*) Patteson, J., said: "Before the statute the acts of the tenants would have been evidence against the reversioner, though their declarations were not so." In *Palk v. Shinner* (*m*), there being a user of twenty years, during the first fifteen years of which the premises were under lease, Erle, J., said, if this case had arisen before the statute, there would have been good evidence to go to the jury, notwithstanding the existence of the tenancy, and the question is still to be left to the jury in the same way (*n*).

Who may
sue.
Rights of
reversioner.

It seems unjust to deprive the reversioner of an immediate remedy in respect of acts which may at a future time furnish evidence against him, and which, though he may possibly in many cases be able then to rebut, must in all cases involve him in trouble and expense, by affecting the evidence of his right. The point is akin to that which is raised in an action by a reversioner for obstructions by others to the enjoyment of easements by his tenants, the ground of which action is, that the evidence of the right of the reversioner to the easement is affected, as his acquiescence in the obstruction would furnish evidence against him of a renunciation and abandonment of it (*o*).

In *Kidgill v. Moor* (*p*) the plaintiff sued for the locking of a gate across a way to which the tenants of the plaintiff were entitled in respect of the tenement of which he was reversioner, and it was objected, on motion in arrest of judgment, that the act complained of was not of a permanent character; but the Court held that the declaration was good, as such an act *might* operate as an injury to the reversionary interest, and that the question whether the plaintiff is injured in his reversionary estate is one of fact for the jury. Maule, J., said: "I cannot doubt that there may be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall; and the allegation that the plaintiff was injured in his reversionary

(*k*) 1850, 9 C. B. 372; 19 L. J. C. P. 177; 82 R. R. 364.

(*l*) 1836, 4 A. & E. 378; 5 L. J. (N. S.) 119; 43 R. R. 358.

(*m*) 1852, 18 Q. B. 575; 22 L. J. Q. B. 27; 88 R. R. 703.

(*n*) And see the judgments in *Daniel v. North*, 1809, 11 East, 372; *Linchan v. Deeble*, 1859, 9 Ir. C. L. R. 309;

Cooper v. Crabtree, 1882, 20 Ch. D. 589; 51 L. J. Ch. 544; *Hanna v. Pollock*, 1900, 2 I. R. 664.

(*o*) See per Tindal, C.J., *Bower v. Hill*, 1835, 1 Bing. N. C. 549; 4 L. J. (N. S.) C. P. 153; 41 R. R. 630.

(*p*) 1850, 9 C. B. 364; 19 L. J. C. P. 177; 82 R. R. 364.

Who may
sue.
Rights of
reversioner.

interest is an allegation of matter of fact . . . which is for the jury to find according to the evidence." And in *Metropolitan Association v. Petch* (q) a declaration in an action by a reversioner for obstructing ancient lights by the erection of a hoarding was sustained, the Court holding that such an erection might be an injury to the reversion, and that it was for the jury to determine. In that case also the judges lay down that the way in which the act might injure the reversioner would be by *affording evidence in denial of the right*. According to the last class of cases, the jury might find for plaintiff if the act complained of would furnish any evidence in denial of the right. It is difficult to discover any principle upon which the reversioner should be without remedy by action in respect of a series of separate acts of obstruction furnishing evidence in denial of the right, while he has such action in the case of the wooden hoarding intervening, or why a series of trespasses in the assertion of a right of way should not give a right of action to a reversioner.

Continuing
disturbance.

If the disturbance be continued, a fresh action may be maintained from time to time by the persons filling the situation of tenant in possession or reversioner (r).

Parties liable
to be sued.

Parties liable to be sued.—The party creating the disturbance is liable to an action, whether he be the owner of the servient tenement or not (s).

Continuing
disturbance.

For the continuance of a disturbance each successive owner in occupation of the servient tenement is liable, though it may have been begun before his estate commenced (t).

Where, however, the party was not the original creator of the disturbance, a request must be made to remove it before any action is brought; but it is sufficient if such request is made to the party in possession, though he be only lessee (u).

(q) 1858, 5 C. B. N. S. 504; 27 L. J. C. P. 330; 116 R. R. 740.

(r) *Penruddock's Case*, 1598, 5 Rep. 101; *Shadwell v. Hutchinson*, 1831, 2 B. & Ad. 97; 4 C. & P. 333; 9 L. J. K. B. 142; 36 R. R. 497; *Battishill v. Reed*, 1856, 18 C. B. 696; 25 L. J. C. P. 291; 107 R. R. 465; *Wilson v. Peto*, 1821, 6 Moore, 47; *Darley Co. v. Mitchell*, 1886, 11 App. Cas. 127; 55 L. J. Q. B. 529; *Crumbie v. Wallsend Local Board*, 1891, 1 Q. B. 503; 60 L. J. Q. B. 392. As to the effect of the death of the plaintiff in an action for obstructing ancient lights, see *Jones v. Simes*, 1890, 43 Ch. D. 607; 59 L. J. Ch. 351.

(s) Com. Dig. Action on the Case for a Nuisance, B.; *Wetton v. Dunk*, 1864, 4

F. & F. 298; 142 R. R. 696; *Thompson v. Gibson*, 1841, 7 M. & W. 456; 10 L. J. Ex. 33; 56 R. R. 762. See *Matthews v. King*, 1865, 3 H. & C. 910.

(t) *Broder v. Saillard*, 1876, 2 Ch. D. 692; 45 L. J. Ch. 414; *White v. Jameson*, 1874, 18 Eq. 303. As to executors, see *Jenks v. Viscount Clifden*, 1897, 1 Ch. 694; 66 L. J. Ch. 338.

(u) *Penruddock's Case*, 1598, 5 Rep. 101; *Brent v. Haddon*, 1620, Cro. Jac. 555. A request to a former occupier while in possession will suffice (*Salmon v. Bensley*, 1825, Ry. & M. 189; 27 R. R. 745). There appears to be no recent authority in favour of the proposition in the text.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court in separate actions will restrain each of them from doing the acts constituting the nuisance, although the act of one taken alone would not amount to nuisance (*v*). Under the old practice such an injunction was granted in one action against several independent persons (*w*). Whether under the present practice one action for an injunction can be maintained against several acting independently is doubtful (*x*). But damages cannot be recovered in one action against separate tortfeasors (*y*). The joinder of defendants in actions of this nature now turns upon R. S. C., Ord. 16, rr. 1 and 4 (*z*).

Parties liable to be sued.

If the owner of land on which a nuisance exists lets the land, an action for the continuance will lie, at the option of the party injured (*a*), either against the tenant (*b*) or (subject to the following remarks) against the landlord (*c*).

Landlord and tenant.

A declaration charging a defendant with the duty of cleansing drains merely "as owner and proprietor" is bad (*d*). No action for the continuance of a nuisance lies against the landlord for an act of his tenant done during the tenancy (*e*) unless it be done by the land-

(*v*) *Lambton v. Mellish*, 1894, 3 Ch. 163; 63 L. J. Ch. 929, where there were several actions; *Blair v. Deakin*, 57 L. T. 522, where there was one action against one such person. And see *Nixon v. Tynemouth*, 1888, 52 J. P. 504.

(*w*) *Thorpe v. Brumfitt*, 1873, 8 Ch. 650.

(*x*) *Sadler v. G. W. R. Co.*, 1896, A. C. 450; 65 L. J. Q. B. 462.

(*y*) *Ibid*.

(*z*) The numerous decisions under these rules should be consulted by the practitioner. In *Munday v. South Metrop. Co.*, 1913, W. N. 90, which was an action brought against several defendants in respect of a nuisance from noise and an obstruction to a right of way, the plaintiff claimed an injunction and damages against both defendants; but it was held by Eady, J., that the case was governed by *Sadler v. G. W. R. Co.*, sup., and that the action must be stayed against one defendant.

(*a*) *I.e.*, if he be a stranger, and not the tenant or his licensee (*Robbins v. Jones*, 1863, 15 C. B. N. S. 240; 33 L. J. C. P. 1; 137 R. R. 475).

(*b*) *Broder v. Saillard*, 1876, 2 Ch. D. 692; 40 L. J. Ch. 414. Cases of covenant stand on a different footing; see *Gaskin v. Balls*, 1879, 13 Ch. D. 324.

(*c*) *Christian Smith's Case*, 1633, Sir W. Jones, 272; *Rosewell v. Prior*, 1702,

2 Salk. 460; 1 Ld. Raym. 713; *R. v. Peddy*, 1834, 1 A. & E. 822; 3 L. J. (N. S.) M. C. 119; 40 R. R. 444; *Todd v. Flight*, 1860, 9 C. B. N. S. 377; 30 L. J. C. P. 21; 127 R. R. 684, in which the previous authorities are reviewed; *A.-G. v. Bradford*, 1866, 2 Eq. 71; 35 L. J. Ch. 619; and *Mason v. Shrewsbury R. Co.*, 1871, L. R. 6 Q. B. 585; 40 L. J. Q. B. 293.

(*d*) *Russell v. Shenton*, 1842, 3 Q. B. 449; 11 L. J. Q. B. 289; 61 R. R. 249.

(*e*) *Cheetham v. Hampson*, 1791, 4 T. R. 318; 2 R. R. 397; *Rich v. Basterfield*, 1847, 4 C. B. 783; 16 L. J. C. P. 273; 72 R. R. 716; *Bishop v. Bedford Charity*, 1859, 1 E. & E. 697; 28 L. J. Q. B. 215; 117 R. R. 408; *R. v. Peddy*, 1834, 1 A. & E. 827; 3 L. J. (N. S.) M. C. 119; 40 R. R. 444, per Littledale, J.; *Preston v. Norfolk E. Co.*, 1858, 2 H. & N. 735; 115 R. R. 777; *Bartlett v. Baker*, 1864, 3 H. & C. 153; 33 L. J. Ex. 8; 140 R. R. 360. As to a tenancy from year to year, see *Gandy v. Jubber*, 1864, 5 B. & S. 78, 485; 33 L. J. Q. B. 151; 136 R. R. 490; 9 B. & S. 15; 140 R. R. 646; *Bowen v. Anderson*, 1894, 1 Q. B. 164; cf. *Kieffer v. Le Seminaire de Quebec*, 1903, A. C. 85; 72 L. J. P. C. 18, where it was held that under Canadian law the landlord was not liable,

Parties liable to be sued.

lord's authority (*f*). And no such action lies against the landlord for an injury due to the dangerous condition of the premises if he has taken from the tenant a covenant to repair; for in such a case he does not authorize the continuance of the nuisance (*g*).

Generally speaking, a landlord is liable for a nuisance on premises occupied by his tenant—(1) where he takes from the tenant a covenant to do things which result in the nuisance (*h*); (2) where he lets the premises for a purpose likely to result and resulting in the nuisance (*i*); (3) where he relets the premises after a nuisance upon them has been created (*k*); (4) if he lets the premises where he knows, or ought to have known, of the existence of a nuisance upon them (*l*).

It seems to have been held that a tenant for years, occupying a house which was an obstruction to light, erected before his tenancy, was not liable to be sued for damages for its continuance; for he had no authority to abate it (*m*).

Liability for act of stranger.

In all cases the defendant must be shown to be in some sense responsible for the continuance of the act complained of. And in a case (*n*) where an obstruction had been created by a stranger, and the defendants, the owners of the locus in quo, had given the plaintiff their permission to remove it, it was held that the defendants were not bound themselves to remove the obstruction even after request made.

Liability for acts of contractor.

The further question, how far an owner who employs a contractor to perform work for him is liable for the consequences of the contractor's negligent or wrongful acts, has been much discussed.

Work unlawful.

Where the work contracted to be done is itself unlawful, or necessarily involves the doing of some unlawful act, the employer is clearly liable (*o*).

Work lawful.

Where the act contracted to be done is in itself lawful, and involves

(*f*) *Harris v. James*, 1876, 45 L. J. Q. B. 545; *Phillips v. Thomas*, 1890, 62 L. T. 793.

(*g*) *Pretty v. Bickmon*, 1873, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, 1875, L. R. 10 C. P. 658.

(*h*) *Burt v. Victoria Co.*, 1882, 47 L. T. 378.

(*i*) *Winter v. Baker*, 1887, 3 T. L. R. 569; *Jenkins v. Jackson*, 1888, 40 Ch. D. 77; 60 L. J. Ch. 206.

(*k*) *Sandford v. Clarke*, 1888, 21 Q. B. D. 398; 57 L. J. Q. B. 507; *Bowen v. Anderson*, 1894, 1 Q. B. 164.

(*l*) See *Nelson v. Liverpool Co.*, 1877,

2 C. P. D. 311; 46 L. J. C. P. 675; *Gwinnell v. Eamer*, sup. As to the effect of the Housing, &c., Act, 1909, ss. 14, 15, see *Ryall v. Kidwell*, 1914, 3 K. B. 135; 88 L. J. K. B. 1140.

(*m*) *Ryppon v. Bowles*, 1615, Cro. Jac. 373.

(*n*) *Saxby v. Manchester R. Co.*, 1869, L. R. 4 C. P. 198; 38 L. J. C. P. 153; cf. *Daniels v. Potter*, 1830, 4 C. & P. 262; 34 R. R. 793.

(*o*) *Ellis v. Sheffield Co.*, 1853, 5 E. & B. 767; 23 L. J. Q. B. 42; 92 R. R. 792.

no special risk or duty which the employer has neglected, it is equally clear that the employer is not liable (*p*).

But where the work contracted to be done is hazardous to third persons, or is otherwise of such a nature as to cast a duty upon the person undertaking it, the employer is bound to see that proper and reasonable precautions are taken, and is liable for any omission in this respect. Nor is it sufficient that, by the contract between employer and contractor, it is stipulated that the precautions shall be taken by the contractor; the employer must also take care that the stipulation is carried out (*q*).

“Unquestionably,” said Williams, J., in delivering the judgment of the Court in *Pickard v. Smith* (*r*), “no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap, in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it furnishes no excuse either in good sense or law.”

In *Bower v. Peate* (*s*), where the defendant was held liable for the

(*p*) *Quarman v. Burnett*, 1840, 6 M. & W. 499; 9 L. J. (N. S.) Ex. 308; 55 R. R. 717; *Reedie v. L. & N. W. R.*, 1849, 4 Ex. 244; 20 L. J. Ex. 65; 80 R. R. 541; *Knight v. Fox*, 1850, 5 Ex. 721; 20 L. J. Ex. 9; *Gayford v. Nicholls*, 1854, 9 Ex. 702; 23 L. J. Ex. 205; 96 R. R. 925; *Kiddell v. Lovett*, 1885, 16 Q. B. D. 605.

(*q*) *Hole v. Sittingbourne R. Co.*, 1861, 6 H. & N. 488; 30 L. J. Ex. 81; 123 R. R. 636; *Gray v. Pullen*, 1864, 5 B. & S. 970; 34 L. J. Q. B. 265; 136

R. R. 752; *Pickard v. Smith*, 1861, 10 C. B. N. S. 470; 128 R. R. 790; *Holliday v. National Telephone Co.*, 1899, 2 Q. B. 392; 68 L. J. Q. B. 1016; *The Snark*, 1900, P. 105; 69 L. J. P. 41.

(*r*) 1861, 10 C. B. N. S. at p. 480; 128 R. R. 790.

(*s*) 1876, 1 Q. B. D. at p. 326. The decision was approved by the House of Lords in *Dalton v. Angus*, 1881, 6 App. Cas. 740, 791, 829; 50 L. J. Q. B. 689.

Parties liable to be sued

Liability for acts of contractor.

Work hazardous.

Pickard v. Smith.

Bower v. Peate.

Parties liable
to be sued.

Liability for
acts of
contractor.

Bower v.
Percival.

act of his contractor in letting down a house entitled to support, the rule was put even more strongly. "A man," said Cockburn, C.J., "who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

Hughes v.
Percival.

The first part of the passage above quoted was, in *Hughes v. Percival* (t), objected to by Lord Blackburn as so broadly stated as to appear to conflict with *Quarman v. Burnett* (u). But the substance of the law is quite clear, and was in fact applied in *Hughes v. Percival* itself. There the defendant, having authorized a contractor to perform some building operations which involved a use of the party-wall between his premises and the plaintiff's, and a risk to the plaintiff's premises themselves, was held liable for damage caused to the plaintiff's premises in the course of the operations by workmen employed by the contractor. "The law," said Lord Fitzgerald, "has been verging somewhat in the direction of treating parties engaged in such an operation as the defendants as insurers of their neighbours or warranting them against injury. It has not, however, reached quite to that point. It does declare that, under such a state of circumstances, it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works so as to protect his neighbours from injury,

(t) 1883, 8 App. Cas. at p. 447; 52 L. J. Q. B. 719.

(u) 1840, 6 M. & W. 499; 9 L. J. (N. S.) Ex. 308; 55 R. R. 717.

and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned; but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be *culpa levissima*” (x).

The decision in *Butler v. Hunter* (y), so far as it is in conflict with the later decisions above referred to, must be held to be overruled (z).

(b) *Forms of Action.*

The ancient common law remedies by assize of nuisance, and the writ of quod permittat prosternere, had long fallen into disuse before they were abolished by the statute for the limitation of actions and suits (a).

Before the Judicature Acts the modern remedies at common law for the disturbance of an easement were an action upon the case or an action of trespass (b).

Since the Judicature Acts there is now (c) only one form of action. Local venue is abolished (d).

(c) *Pleadings.*

The Allegation of Title.—Whenever a party claims more than he is entitled to of common right, he must allege in his pleading that he ought to have that which he demands (e).

In early authorities a distinction is taken as to the mode of alleging title in actions against strangers and in actions against the terretenant of the servient tenement: in the former case it was admitted that a general allegation, “that he had and ought to have the right claimed,” was sufficient; while in the latter case it was said

(x) Cf. as to the liabilities of local authorities for the default of their contractors, *Smith v. West Derby Board*, 1878, 3 C. P. D. 423; 47 L. J. C. P. 607; *Hardaker v. Idle Council*, 1896, 1 Q. B. 335; 65 L. J. Q. B. 363; *Penny v. Wimbledon Council*, 1898, 2 Q. B. 212; 1899, 2 Q. B. 72; 68 L. J. Q. B. 704; *Hill v. Tottenham Council*, 1899, 79 L. T. 495.

(y) 1862, 7 H. & N. 826; 31 L. J. Ex. 214; 126 R. R. 730.

(z) See per Lord Blackburn, 6 App. Cas. 829; 8 App. Cas. 447.

(a) 3 & 4 Will. 4, c. 27, s. 36.

(b) See this subject fully discussed in *Harris v. Ryding*, 1839, 5 M. & W. 72; 8 L. J. (N. S.) Ex. 181; 52 R. R. 632;

see also *Fay v. Prentice*, 1845, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823; *Pitts v. Gaince*, 1701, Salk. 10; *Earl of Shrewsbury's Case*, 1738, 9 Rep. 46 b; *Mikes v. Caly*, 1796, 12 Mod. 382; *Wells v. Ody*, 1836, 1 M. & W. 452; 5 L. J. (N. S.) Ex. 199; 46 R. R. 358.

(c) Rules of the Supreme Court, 1883, Ord. 1, r. 1.

(d) Rules of the Supreme Court, 1883, Ord. 36, r. 1.

(e) *Wyatt v. Harrison*, 1832, 3 B. & Ad. 871; 1 L. J. (N. S.) K. B. 237; 37 R. R. 566; *Tebbutt v. Selby*, 1837, 6 A. & E. 786; 6 L. J. K. B. 175; *Laing v. Whaley*, 1858, 3 H. & N. 675, 901; 27 L. J. Ex. 422; 117 R. R. 918, 926.

Parties liable to be sued.
Liability for acts of contractor.
Hughes v. Percival.

Remedy by action.
Real actions abolished.

Trespass or case.

Forms of action abolished.

Early authorities.

that a title by grant or prescription must be shown, it being an attempt to "put a charge upon" the defendant (*f*). By subsequent decisions it appears to have been held that in all actions for disturbance of an easement, whether the action be brought against the servient owner or a stranger, a general allegation of right was sufficient (*g*). But where the defendant justified his act by virtue of an easement he was obliged to set out the particular title upon which he relied, whether by grant or prescription (*h*).

Pleadings
after the
Prescription
Act, 1832.

In the case of actions brought after the Prescription Act, 1832, modifications in pleading were introduced by s. 5 of the Act (which is set out at length ante, p. 202). Under this section it is necessary to allege enjoyment "as of right" in claiming a prescriptive right of way (*i*), but not in claiming a prescriptive right to light (*k*); enjoyment as of right meaning an enjoyment "nec vi, nec clam, nec precario" (*l*).

The concluding words of the 5th section provide that "any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment shall be specially alleged and set forth." "The simple fact of enjoyment" was explained in the judgments quoted below to mean a continuous enjoyment as of right, and as an easement. And having regard to these words, the Courts held that it was necessary to allege specially things consistent with such enjoyment, e.g., a tenancy for life (*m*), or a licence extending over the whole period (*n*), or such facts as that during the first part of the period of enjoyment the user was in exercise of a statutory right; and the statutory right having ceased, the enjoyment was continued for the rest of the period (*o*); but that it was not necessary to allege specially things inconsistent with such enjoyment—e.g., unity of ownership,

(*f*) *St. John v. Moody*, 1687, 3 Keb. 528, S. C. 531; *Blockley v. Slater*, 1693, 1 Lut. fol. 119; *Winford v. Wollaston*, 1797, 3 Lev. 266. Cf. *Bullard v. Harrison*, 1815, 4 M. & S. 387; 16 R. R. 493.

(*g*) *Sandys v. Trefusis*, 1640, Cro. Car. 575; *Villers v. Ball*, 1689, 1 Shower, 7; *Tenant v. Goldwin*, 1705, 1 Salk. 360; S. C. 2 Ld. Raym. 1089; *Rider v. Smith*, 1790, 3 T. R. 766; 2 Wms. Saund. 113 a, note; 2 Notes to Saund. 361; Com. Dig., Pleader (C. 39); see also *Trower v. Chadwick*, 1836, 3 Scott, 699; 3 Bing. N. C. 334; 6 L. J. (N. S.) C. P. 47; 43 R. R. 659, preface, vi.

(*h*) See Com. Dig., Chimin, D. 2; 1 Wms. Saund. 624; *Bird v. Dickinson*, 1701, 2 Lut. 1526; *Grimstead v. Marlowe*, 1792, 4 T. R. 717; 2 R. R. 512; *Bailey v. Appleyard*, 1838, 8

A. & E. 167; 7 L. J. (N. S.) Q. B. 145; 47 R. R. 537.

(*i*) *Holford v. Hankinson*, 1844, 5 Q. B. 584.

(*k*) See *Colls v. Home Stores*, 1904, A. C. 205; 73 L. J. Ch. 484.

(*l*) See *Gardner v. Hodgson's Brewery*, 1903, A. C. 238; 72 L. J. Ch. 558.

(*m*) *Pye v. Mumford*, 1848, 11 Q. B. 666; 17 L. J. Q. B. 138; 75 R. R. 582; *Warburton v. Parke*, 1857, 2 H. & N. 64; 26 L. J. Ex. 298; 115 R. R. 433. See s. 7 of the Act, ante, p. 203.

(*n*) *Tickle v. Brown*, 1836, 4 A. & E. 369, 382; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358.

(*o*) *Kintoch v. Neville*, 1840, 6 M. & W. 795; 10 L. J. Ex. 248; 55 R. R. 784.

or stealth, or leave given during the period (*p*); all of which could be given in evidence under a general traverse.

In *Tickle v. Brown* (*g*) it was held that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a licence covering the whole of that period, he must reply such licence specially, but a licence granted and acted on during the period may be given in evidence under the general traverse of the enjoyment “during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years.” In *Beasley v. Clarke* (*r*) Tindal, C.J., said: “Under a replication, denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section, ‘not inconsistent with the simple fact of enjoyment,’ being referable, as we understand the statute, to the fact of enjoyment as before stated in the Act, viz., an enjoyment claimed and exercised as of right.” In *Onley v. Gardiner* (*s*) the Court of Exchequer decided that unity of actual possession was inconsistent with the simple fact of enjoyment as of right, and, therefore, need not be specially pleaded. The simple fact of enjoyment, referred to in the 5th section, is an enjoyment as of right; and proof that there was an occasional unity of actual possession is as much in denial of that allegation as the occasionally asking permission would be; because the enjoyment during the unity of possession could not be an enjoyment as of an easement.

The disabilities and exceptions mentioned in the 7th and 8th sections must be alleged in answer to a pleading claiming an easement under the Act (*t*); so must the fact that the enjoyment was

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| <p>(<i>p</i>) <i>Onley v. Gardiner</i>, 1838, 4 M. & W. 496; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704; <i>Beasley v. Clarke</i>, 1836, 2 Bing. N. C. 705; 5 L. J. (N. S.) C. P. 281; 42 R. R. 704; <i>Monmouthshire Co. v. Harford</i>, 1834, 1 C. M. & R. 614; 4 L. J. (N. S.) Ex. 43; 40 R. R. 648.</p> <p>(<i>q</i>) 1836, 4 A. & E. 369; 5 L. J. (N. S.) K. B. 119; 43 R. R. 358.</p> <p>(<i>r</i>) 1836, 3 Scott, 258; 2 Bing. N. C.</p> | <p>705; 5 L. J. (N. S.) C. P. 281; 42 R. R. 704.</p> <p>(<i>s</i>) 1838, 4 M. & W. 498; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704.</p> <p>(<i>t</i>) <i>Pye v. Mumford</i>, 1848, 11 Q. B. 666; 17 L. J. Q. B. 138; 75 R. R. 582. As to pleading where a tenancy for life is alleged, see S. C.; also <i>Clayton v. Corby</i>, 1842, 2 Q. B. 813; 57 R. R. 807.</p> |
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under a statutory right which ceased before the expiration of the required period of enjoyment (*u*); or that the servient owner and his agents were absent from the neighbourhood and ignorant of the enjoyment during the whole period; or, in short, any other facts which would rebut the inference of a right by prescription or grant. The 7th and 8th sections only apply to the affirmative easements included in the 2nd section, so that those sections cannot be set up in answer to a claim of an easement of light by virtue of twenty years' enjoyment.

Pleading
prescriptive
rights under
the Jud. Acts.

Sect. 5 of the Prescription Act and the decisions under it must now be read in connection with the rules of pleading established under the Judicature Acts, and so far as inconsistent therewith the section must be taken to have been repealed (Jud. Act, 1875, ss. 17, 21, 33). R. S. C., Ord. 19, provides (r. 4) that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies; and, further (r. 15) that a party must raise by his pleading all matters which show the action or counterclaim not to be maintainable, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise; and, further (r. 17) that in a defence or reply a general denial shall not be sufficient, but the party must deal specifically with each allegation of fact of which he does not admit the truth. Pleadings need not state inferences of law (*v*).

The forms of pleading contained in the appendices to R. S. C. (see Ord. 19, r. 5)—which are not to be slavishly adhered to (*w*), but illustrate the meaning of the Act (*x*)—include a statement of claim in an action for obstruction of light (App. C, s. 6, No. 10), which contains the simple allegation: "The plaintiff is the owner of a house in which are the following ancient lights, &c." Further, to the defence in an action for obstructing light, or for polluting water given in App. D, s. 6, there is added the following note: "If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, i.e., whether by prescription, grant, or what."

It would seem from Ord. 19 that the general allegations and denials which were sufficient within s. 5 of the Prescription Act, 1832, are now insufficient.

Accordingly in an action to restrain the obstruction of an alleged

(*u*) *Kinloch v. Nevile*, 6 M. & W. 795; 10 L. J. Ex. 248; 55 R. R. 784.

(*v*) *Hanmer v. Flight*, 1876, 24 W. R. 347.

(*w*) *The Isis*, 1883, 8 P. D. 228; 53 L. J. P. 14.

(*x*) *Turquand v. Fearon*, 1879, 40 L. T. 545.

private right of way, the plaintiff was held bound in pleading to state the title by which he claimed, and whether by grant or by prescriptive user (*y*). Where in trespass the defendants pleaded that the locus in quo was a highway, they were ordered to show the mode in which they claimed that it had become a highway, and to give particulars of dedication (*z*).

Under the R. S. C. a joinder of issue, not being by way of defence to a counterclaim, operates as a denial of every material allegation of facts in the pleading upon which issue is joined, other than such as are expressly excepted (*a*). No reply may now be delivered unless the same be ordered, and if no reply is ordered, or if a reply is ordered and is not delivered within the period allowed for the purpose, the pleadings are closed, and all the material statements of fact in the defence are deemed to have been denied and put in issue (*b*).

Under the present system of pleading, it is conceived that, whether the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at common law, or under the Prescription Act (*c*); and in many cases it is advisable to plead, alternatively, a title by all three methods.

As the right to an easement exists in respect of the dominant tenement, the pleading usually states the possession of the tenement by the party, and that by reason thereof he was entitled to the right in question.

A pleading under the Prescription Act was required to state the enjoyment to have been without interruption (*d*). Under a plea of forty years' user, according to the statute, evidence of what took place before that period was admissible as showing the state of things at the commencement of the forty years' enjoyment (*e*).

According to modern practice, a lost grant, if relied upon, should be pleaded (*f*); but claims based on lost grant have been added by amendment at the trial (*g*). Formerly, the names of the parties to,

Pleading lost grant.

(*y*) *Harris v. Jenkins*, 1882, 22 Ch. D. 483; 52 L. J. Ch. 437; *Farrell v. Coogan*, 1890, 12 L. R. Ir. 14. See *Pledge v. Pomfret*, 1905, W. N. 56.

(*z*) *Spedding v. Fitzpatrick*, 1888, 38 Ch. D. 410; 58 L. J. Ch. 139.

(*a*) Ord. 19, r. 18.

(*b*) Ord. 23, r. 1; Ord. 27, r. 13.

(*c*) *Harris v. Jenkins*, 1882, 22 Ch. D. 481; 52 L. J. Ch. 437; and see *Smith v. Baxter*, 1900, 2 Ch. 138, 146; 69 L. J. Ch. 437; *Hyman v. Van*

den Bergh, 1907, 2 Ch. 516, 524; 1908, 1 Ch. 167, 169, 176; 77 L. J. Ch. 154; cf. *Spedding v. Fitzpatrick*, 1888, 38 Ch. D. 410; 58 L. J. Ch. 139; *Pledge v. Pomfret*, 1905, 92 L. T. 560.

(*d*) Per Patteson, J., in *Richards v. Fry*, 1838, 7 A. & E. 701.

(*e*) *Lawson v. Langley*, 1836, 4 A. & E. 890; 43 R. R. 513.

(*f*) *Smith v. Baxter*, 1900, 2 Ch. 147; 69 L. J. Ch. 437.

(*g*) *Brown v. Dunstable*, 1899, 2 Ch.

and the date of, the supposed grant had to be stated (*h*); but on averment that the deed had been lost profert was excused (*i*). The statement of date and parties is no longer necessary (*k*). But a statement whether the supposed grant was before or after a private Act was required (*l*).

There appears to be no precedent of a pleading of an easement arising from the disposition of the owner of two tenements; but it should seem that, as in the easements of necessity, the right must be pleaded as arising by implied grant from the joint owner at the time of severance. The pleading might allege the joint ownership and subsequent conveyance, and aver the apparent and continuous nature of the easement, and its existence at the period of severance.

A pleading of an easement of necessity must, in like manner, allege the joint ownership at the time of the conveyance, and that the easement is essential to the full enjoyment of the principal thing conveyed or reserved (*m*).

The party should describe in his pleading the nature of the right in question. Thus, in an action for the disturbance of a way, he should state the terminus a quo and ad quem, and the kind of way he claims, as a footway, &c. (*n*). But a precise local description, as by alleging the land to be in any particular place, is not requisite; and it is not necessary, although it is convenient, to give the intervening closes (*o*).

As regards the allegation and proof of damage, the rule should be borne in mind that actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of "a right," in which case the law will presume damage (*p*). Again, wherever any act injures another's rights and would be evidence in future in favour of the wrongdoer, an action may be maintained for the invasion of the right without proof of specific injury (*q*). These

Pleading
damage.

380, 387; 68 L. J. Ch. 498; *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 601; 72 L. J. Ch. 558.

(*h*) *Hendy v. Stephenson*, 1808, 10 East, 55. See *Livett v. Wilson*, 1825, 3 Bing. 115; *Doe v. Reed*, 1821, 5 B. & Ald. 232; 24 R. R. 338.

(*i*) *Read v. Brookman*, 1789, 3 T. R. 151.

(*k*) See the pleadings in *Norfolk v. Arbutnot*, 1879, 4 C. P. D. 293; 50 L. J. Q. B. 384; *Brown v. Dunstable*, 1899, 2 Ch. 380; 68 L. J. Ch. 498.

(*l*) *Palmer v. Guadagni*, 1906, W. N. 165.

(*m*) *Proctor v. Hodgson*, 1855, 10 Ex. 824; 24 L. J. Ex. 195; 102 R. R. 852;

Bullard v. Harrison, 1815, 4 M. & S. 387; 16 R. R. 493.

(*n*) Vide Com. Dig. Action on the Case for a Disturbance, B. (1); Chimin, D. (2); *Harris v. Jenkins*, 1882, 22 Ch. D. 481; 52 L. J. Ch. 437.

(*o*) *Simpson v. Lewthwaite*, 1832, 3 B. & Ad. 226; 1 L. J. (N. S.) K. B. 126; 37 R. R. 413; *Harris v. Jenkins*, 1882, ubi sup.

(*p*) Per Parke, B., *Embrey v. Owen*, 1851, 6 Ex. 368; 20 L. J. Ex. 312; 86 R. R. 331; per Little Dale, J., *Williams v. Morland*, 1824, 2 B. & C. 916; 2 L. J. K. B. 191; 26 R. R. 579.

(*q*) 1 Wms. Saund. 626.

rules have been applied in the case of actions of trespass to land (*r*) ; Pleadings. in the case of actions for diversion of water (where it has been pointed out that the defendant might by the diversion acquire a right injurious to the plaintiff (*s*)) ; in the case of actions for pollution of water (*t*) ; and in the case of actions for the disturbance of rights of way (*u*).

In applying these rules, however, it is necessary to bear in mind the distinction between various " rights." Thus, where water was taken from a river by the licensee of an upper riparian owner, a lower riparian owner was refused an injunction on the ground that the water taken was returned undiminished in quantity and undeteriorated in quality, so that the acts of the licensee could never grow into a prescriptive title, and the right of the lower riparian proprietor was not in fact interfered with (*x*). Again, as regards support, a landowner has the right to insist that his land shall not be let down by his neighbour's excavation. But supposing the neighbour to excavate, the landowner has no right of action unless and until subsidence follows (*y*).

In the case of an action for diversion of water, the principle that to sustain the action actual damage need not be alleged or proved applies not only in the case of natural rights, but also where rights in respect of water have been acquired by grant or user (*z*), or arise under a statute (*a*).

In an action on the case for a disturbance it was held sufficient to allege a disturbance generally, without showing the particular manner of the disturbance (*b*). " I incline to think," said Lord Ellenborough (*c*), " that the gravamen need not be described with any local certainty. A plaintiff in such an action may indeed make

Allegation of breach of duty.

(*r*) See the judgment of Lord Holt, C.J., in *Ashby v. White*, 1 Sm. L. C., 11th ed., 240 ; 1703, 2 Ld. Raym. 938.

(*s*) *Wilts Co. v. Swindon Co.*, 1874, 9 Ch. 457, 458 ; *Roberts v. Gwyrfai*, 1899, 2 Ch. 610 ; 68 L. J. Ch. 757. See *Embrey v. Owen*, sup. ; *Harrop v. Hirst*, 1868, L. R. 4 Ex. 47 ; 38 L. J. Ex. 1 ; *McCartney v. Londonderry Co.*, 1904, A. C. 313 ; 73 L. J. P. C. 73 ; *Bickett v. Morris*, 1866, L. R. 1 H. L. Sc. 60.

(*t*) *Jones v. Llanrwst*, 1911, 1 Ch. 402 ; 80 L. J. Ch. 145.

(*u*) *Bower v. Hill*, 1835, 1 Bing. N. C. 555 ; 4 L. J. (N. S.) C. P. 153 ; 41 R. R. 630 ; *Clifford v. Hoare*, 1874, L. R. 9 C. P. 372 ; 43 L. J. C. P. 225.

(*x*) *Kensit v. G. E. R.*, 1884, 27 Ch. D. 130 ; 52 L. J. Ch. 608. See *McCartney v. Londonderry Co.*, 1904, A. C. 313 ;

73 L. J. P. C. 73. Compare *Ormerod v. Todmorden*, 1883, 11 Q. B. D. 155 ; 52 L. J. Q. B. 445. And see ante, pp. 283, 284.

(*y*) *Backhouse v. Bonomi*, 1861, 9 H. L. C. 503 ; 34 L. J. Q. B. 181 ; 131 R. R. 305.

(*z*) *Northam v. Hurley*, 1853, 1 E. & B. 665 ; 22 L. J. Q. B. 183 ; 93 R. R. 329 ; *Rawston v. Taylor*, 1855, 11 Ex. 369 ; 25 L. J. Ex. 33 ; 105 R. R. 567 ; *Harrop v. Hirst*, sup.

(*a*) *Rochdale Co. v. King*, 1849, 14 Q. B. 122 ; 18 L. J. Q. B. 293 ; 80 R. R. 222, 233.

(*b*) Com. Dig. Action on the Case for a Disturbance, B. (1) ; *Anon.*, 1566, 3 Leon. 13 ; *Dawney v. Dee*, 1621, Cro. Jac. 604.

(*c*) *Mersey v. Douglas*, 1802, 2 East, 497.

it necessary to prove the gravamen in a particular place, by giving it a specific local description, as by alleging the nuisance as standing and being in a certain place, particularly described; but in general such particularity is not necessary." "It is sufficient to describe the substance of the injury, in order to give the other party notice of what he is to defend." "It would have been sufficient," said Le Blanc, J., "to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened." In *Tebbutt v. Selby*, however, Patteson, J., appears to have doubted whether such a general allegation of obstruction would be sufficient (*d*), and nowadays particulars would undoubtedly be ordered.

In a pleading by the reversioner he must show that he sues in that capacity, and allege that the disturbance is to the injury of his reversionary estate (*e*).

(d) *Remedy by Injunction.*

Injunctions
granted by
Court of
Chancery.

The remedy which was afforded at common law for the continuous disturbance of easements or other nuisances, by an indefinite series of actions for damage, was obviously, in many cases, quite inadequate; and the Court of Chancery always exercised, and the High Court still exercises, the power of interfering, by injunction, to stop the whole mischief complained of (*f*).

By High
Court.

The foundation of the plaintiff's right in such cases being a right at common law, the Court of Chancery, before finally granting equitable relief, at one time required that the legal right of the person seeking relief should be established in a proceeding at law (*g*). Now, by the Jud. Act, 1873, the jurisdiction both of the Court of Chancery and of the common law Courts is vested in the High Court of Justice, which has power to entertain legal and equitable claims and defences alike.

Perpetual
injunctions.

Before a perpetual injunction can be granted to restrain a private

(*d*) 1837, 6 A. & E. 793. See R. S. C., App. C (vi.), 12.

(*e*) *Jackson v. Pesked*, 1813, 1 M. & S. 234; 14 R. R. 417.

(*f*) *Robinson v. Lord Byron*, 1785, 1 Bro. C. C. 583 (watercourse); *Thorpe v. Brumfitt*, 1873, 8 Ch. 650 (way); *Arcedekne v. Kelk*, 1858, 2 Giff. 683; 128 R. R. 228; *Herz v. Union Bank of London*, 1858, 2 Giff. 686, and *Wilson v. Townend*, 1861, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 127 R. R. 124 (light); *Hunt v. Peake*, 1860, Johns. 705; 29 L. J. Ch. 785; 123 R. R. 301 (natural right of sup-

port); *N. E. R. v. Elliott*, 1863, 10 H. L. C. 333 (easement of support).

(*g*) See judgments in *Imperial Gas Co. v. Broadbent*, 1859, 7 H. L. C. 600; 29 L. J. Ch. 377; 115 R. R. 295; *Cardiff v. Cardiff*, 1859, 4 De G. & J. 596; *Eaden v. Firth*, 1863, 1 H. & M. 573; 136 R. R. 247; *Roskell v. Whitworth*, 1870, 5 Ch. 459; 39 L. J. Ch. 765. It never was a ground of demurrer that the legal right had not yet been tried, though it was ground for not granting interlocutory injunctions.

nuisance or the disturbance of an easement, the Court as a general rule requires the party to establish his legal right and the fact of its violation. But when these things have been established, then, unless there be something special in the case, the party is entitled as of course to an injunction to prevent the recurrence of that violation (*h*). An easement is a legal right. The remedy by injunction is in aid of that legal right. The owner of the right is entitled to an injunction, not in the discretion of the Court, but as of course; unless there is something special in the case, e.g., laches, or the fact that the disturbance is only trivial or occasional (*i*). The grounds on which the Court acts in granting an injunction were thus stated by Wood, L.J., in *A.-G. v. Cambridge Co.* (*k*): "Where the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two grounds, which are of a totally distinct character: one is that the injury is irreparable, as in the case of cutting down trees; the other, that the injury is continuous, and so continuous that the Court acts upon the same principle as it used in older times with reference to bills of peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable. As an illustration of this class of case I may refer to *Soltan v. De Held* (*l*), where the annoyance from the ringing of the bell was in itself slight, but it was so continuous that the Court thought fit to arrest the nuisance *brevi manu* and save the complainant all further annoyance."

"Irreparable injury" has been referred to as meaning injury which cannot be compensated in damages (*m*).

To obtain an injunction, proof of actual damage is not necessary where a right of property has been infringed (*n*); or where the parties to a contract for valuable consideration with their eyes open have contracted that a particular thing shall not be done (*o*). Again, where the wrong is of a recurring nature an injunction may be obtained even though the actual damage is slight (*p*). The Court,

(*h*) *Imperial Gas Co. v. Broadbent*, 1859, 7 H. L. C. 612; 29 L. J. Ch. 377; 115 R. R. 295; *Fullwood v. F.*, 1878, 9 Ch. D. 176; 47 L. J. Ch. 459; *Martin v. Price*, 1894, 1 Ch. 285; 63 L. J. Ch. 209.

(*i*) *Cowper v. Laidler*, 1903, 2 Ch. 341; 72 L. J. Ch. 578.

(*k*) 1868, 4 Ch. 81; 38 L. J. Ch. 94.

(*l*) 2 Sim. N. S. 133; 21 L. J. Ch. 153; 89 R. R. 245.

(*m*) *Mogul Co. v. McGregor*, 1885, 15 Q. B. D. 486; 54 L. J. Q. B. 540; *A.-G.*

v. Hallitt, 1847, 16 M. & W. 581; 16 L. J. Ex. 262; 74 R. R. 638.

(*n*) *Jones v. Llanrwst*, 1911, 1 Ch. 402; 80 L. J. Ch. 145 (where Parker, J., refers to other authorities); *Thorpe v. Brumfitt*, 1873, 8 Ch. 656; *Pennington v. Brinsop*, 1877, 5 Ch. D. 772; 46 L. J. Ch. 773.

(*o*) *Formby v. Barker*, 1903, 2 Ch. 554; 75 L. J. Ch. 716.

(*p*) *Clowes v. Staffordshire Co.*, 1872, 8 Ch. 142; 42 L. J. Ch. 107.

Mandatory
injunction.

however, will not interfere by injunction where the violation of a legal right is trivial (*g*), nor will it interfere by injunction to restrain actionable wrongs for which damages are the proper remedy (*r*).

A distinction was taken in some early cases between those injunctions which merely prevent the doing of an act and those the consequence of which, either directly or indirectly, will be to compel a party to do some act, as to fill up a ditch (*s*), or pull down a wall (*t*); the former being granted on motion, the latter only at the trial. This distinction, however, though recognized, does not appear to have been strictly attended to; indeed, in one case (*u*), Lord Eldon, though he refused the order, as prayed, "to restrain the defendant from continuing to keep certain roads out of repair," purposely made an order in such a form as to have the same effect, by making it difficult for the defendant to avoid completely repairing his works. "I take leave," said Lord Brougham, in commenting on this case, in his judgment in *Blakemore v. Glamorganshire Navigation* (*x*), "to agree with Lord Lyndhurst in the opinion that, if this Court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt on the jurisdiction." The question of jurisdiction his Lordship does not expressly decide; "although," he continues, "we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause, and, without denying the jurisdiction, decline to exercise it."

The Court has now departed from the "roundabout mode," and where an injunction is granted, the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, the order is made in a direct mandatory form, and not in the indirect form hitherto in use (*y*).

(*g*) *Coulson v. White*, 1743, 3 Atk. 21; *A.-G. v. Sheffield Co.*, 1853, 3 D. M. & G. 304; 22 L. J. Ch. 811; 98 R. R. 151; *Swaine v. G. N. R. Co.*, 1864, 10 Jur. N. S. 191; 33 L. J. Ch. 399; *Durell v. Pritchard*, 1865, 1 Ch. 244; 35 L. J. Ch. 223; *Cooke v. Forbes*, 1867, 5 Eq. 166; 37 L. J. Ch. 178; *A.-G. v. Cambridge Co.*, 1868, 4 Ch. 71; 38 L. J. Ch. 94; *Llandudno v. Woods*, 1899, 2 Ch. 705; 68 L. J. Ch. 623; *Behrens v. Richards*, 1905, 2 Ch. 614; 74 L. J. Ch. 615.
(*r*) *London and Blackwall Co. v. Cross*, 1886, 31 Ch. D. 369; 55 L. J. Ch. 313; *Wood v. Sutcliffe*, 1851, 2 Sim. N. S. 165; 21 L. J. Ch. 253; 89 R. R. 262.

(*s*) *Robinson v. Byron*, 1785, 1 Bro. C. C. 588.

(*t*) *Ryder v. Bentham*, 1750, 1 Ves. sen. 543.

(*u*) *Lane v. Newdigate*, 1804, 10 Ves. 192; 7 R. R. 381.

(*x*) 1832, 1 My. & K. 184; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289, preface, vi. Cf. the observations of Jessel, M.R., in *Smith v. Smith*, 1875, 20 Eq. at p. 504; 44 L. J. Ch. 630; and *Bidwell v. Holden*, 1890, 63 L. T. 104.

(*y*) *Jackson v. Normanby*, 1899, 1 Ch. 438; 68 L. J. Ch. 407; Seton on Decree, 7th ed., pp. 369, 539.

The jurisdiction to grant a mandatory injunction, even on interlocutory motion, has, in recent years, often been asserted (*a*).

Mandatory injunction granted on motion.

Such an injunction may order the pulling down of work done or erected after the commencement of an action, or after notice given to the defendant that his erecting it will be objected to (*b*), even where the work or erection was completed before writ issued (*c*). A mandatory injunction may be granted on interlocutory application (*d*). On the question of granting such an injunction it is important to see if the defendant knew he was doing wrong (*e*). But there must be no acquiescence on the part of the plaintiff (*f*).

The question whether the Court will interfere interlocutorily by injunction before the plaintiff's right is decided one way or the other by a trial is one depending upon the discretion of the Court, having regard to all the circumstances, including the clearness, extent and amount of the plaintiff's right, the injury which he is likely to sustain, his promptness in complaining, and a comparison of the injury likely to result to the plaintiff or defendant respectively, in case the ultimate issue should be in his favour, by reason of the refusal or the granting of the injunction, as the case may be (*g*).

Interlocutory injunction.

The provision in the Jud. Act, 1873 (*h*), which empowers the Court to grant an interlocutory injunction "in all cases in which it shall appear to the Court to be just or convenient that such order should be made," is not intended to disturb the settled principles on which injunctions were formerly granted or refused (*i*). The provision enables the Court to grant injunctions, e.g., in trespass, where in practice it previously did not do so (*k*), but not where there was previously no jurisdiction (*l*).

(*a*) *Mexborough v. Bower*, 1843, 7 Beav. 127; 64 R. R. 34; *Hervey v. Smith*, 1855, 1 K. & J. 389; 103 R. R. 141; *Westminster Co. v. Clayton*, 1867, 39 L. J. Ch. 476; *Beadel v. Perry*, 1866, 3 Eq. 465.

(*b*) *Smith v. Day*, 1880, 13 Ch. D. 651; 50 L. J. Ch. 333; *Kelk v. Pearson*, 1871, 6 Ch. 809; *Clifford v. Holt*, 1899, 1 Ch. 698; 68 L. J. Ch. 332.

(*c*) *Lawrence v. Horton*, 1890, 62 L. T. 749; *Shiel v. Godfrey*, 1893, W. N. 115.

(*d*) *Daniel v. Ferguson*, 1891, 2 Ch. 27; *Von Joel v. Hornsey*, 1895, 2 Ch. 774; 65 L. J. Ch. 102; *Keeble v. Poole*, 1911, 105 L. T. 474.

(*e*) *Smith v. S.*, 1875, 20 Eq. 503, 505; 44 L. J. Ch. 630.

(*f*) *Gaskin v. Balls*, 1879, 13 Ch. D. 324; *Baxter v. Bower*, 1875, 23 W. R.

805; 44 L. J. Ch. 624.

(*g*) See 2 Daniell, Chancery Practice, 7th ed. 1360; and *Wynstanley v. Lee*, 1818, 2 Swan. 336; *Hilton v. Granville*, 1841, Cr. & Ph. 297; 10 L. J. Ch. 398; 54 R. R. 297; *Newson v. Pender*, 1884, 27 Ch. D. 43.

(*h*) 36 & 37 Vict. c. 66, s. 25 (8).

(*i*) See *Beddow v. Beddow*, 1878, 9 Ch. D. 89; 47 L. J. Ch. 588; *Day v. Brownrigg*, 1873, 10 Ch. D. at p. 37, per James, L.J.; 48 L. J. Ch. 173; *Gaskin v. Balls*, 1879, 13 Ch. D. 324; *Fletcher v. Rodgers*, 1878, 27 W. R. 97.

(*k*) *Cummins v. Perkins*, 1899, 1 Ch. 20; 68 L. J. Ch. 57.

(*l*) *N. London Co. v. G. N. R.*, 1883, 11 Q. B. D. 30; 52 L. J. Q. B. 380; *Kitts v. Moore*, 1895, 1 Q. B. 253; 64 L. J. Ch. 152.

“The leading principle,” said Lord Brougham in *Blakemore v. Glamorganshire Navigation* (*m*), “on which I proceed in dealing with this application,—the principle which, I humbly conceive, ought, generally speaking, to be the guide of the Court and to limit its discretion in granting injunctions, at least where no special circumstances occur,—is, that such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay injury, to keep things as they are for the present.” It is not necessary, in order that an interlocutory injunction may be obtained, that the evidence of right shall be conclusive. The party applying must, however, make out a *prima facie* case, and satisfy the Court that there is a question to be tried at the hearing (*n*). He must also show that, unless an interlocutory injunction be granted, he will sustain irreparable injury, i.e., such an injury as cannot be compensated in damages (*o*).

Undertaking
as to
damages.

Where the plaintiff obtains an interlocutory injunction, an undertaking by him to abide by any order which the Court may make as to damages, in case the Court should afterwards be of opinion that the defendants have sustained any, by reason of the order, which the plaintiff ought to pay, is inserted in the order as a matter of course (*p*); and where an interlocutory injunction has been granted on such an undertaking, and afterwards at the trial the plaintiff does not obtain an injunction, an inquiry as to damages may be directed, even though the plaintiff obtained the order without misrepresentation, concealment, or default (*q*).

Undertaking
to pull down.

In some cases the Court has ordered a motion for an interim injunction to stand over until the trial, on the defendant undertaking to abide by any order which may be made at the trial as to pulling down the additional buildings to be erected (*r*); but no such undertaking is required in order to found the jurisdiction of the Court over buildings erected after the commencement of the action (*s*).

(*m*) 1832, 1 My. & K. 185; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289, preface, vi.

(*n*) *Preston v. Luck*, 1844, 27 Ch. D. at p. 506, per Cotton, L.J.; *Challender v. Royle*, 1887, 36 Ch. D. 425; 56 L. J. Ch. 995; *Peru v. Dreyfus*, 1888, 38 Ch. D. 362; 57 L. J. Ch. 536.

(*o*) *A.-G. v. Hallett*, 1847, 16 M. & W. 581; 16 L. J. Ex. 262; 74 R. R. 638; *Mogul Co. v. McGregor*, 1885, 15 Q. B. D. 486; 54 L. J. Q. B. 540.

(*p*) *Chappell v. Davidson*, 1856, 8 D. M. & G. 1; *Graham v. Campbell*, 1878, 7 Ch. D. 490; 47 L. J. Ch. 593.

(*q*) *Griffith v. Blake*, 1884, 27 Ch. D.

474; 53 L. J. Ch. 965, where the Lords Justices dissented from an opinion to the contrary expressed by Jessel, M.R., in *Smith v. Day*, 1882, 21 Ch. D. 421; 50 L. J. Ch. 333.

(*r*) *Wilson v. Townend*, 1860, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 127 R. R. 124.

(*s*) *Smith v. Day*, 1880, 13 Ch. D. 651. Cf. *Aynsley v. Glover*, 1874, 18 Eq. 544, per Jessel, M.R., at p. 553; 43 L. J. Ch. 777; *Mackey v. Scottish Widows*, 1876, 1 R. 10 Eq. 113; *Greenwood v. Horsey*, 1886, 33 Ch. D. 471; 55 L. J. Ch. 917.

As regards delay, it has been held that, even though there has been no such acquiescence as to amount to constructive grant of a right, a party may be barred by delay from obtaining an injunction (*t*). There may be a difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction (*u*).

Delay.

The question whether for any particular disturbance of an easement a party could obtain damages, or an injunction, or both, depended for a long time on the different jurisdictions of the Courts of common law and equity. In some cases a party came into a Court of equity for an injunction and was sent to a Court of law to recover damages, being thus bandied about from one Court to another (*x*). In 1858 the Act commonly known as Lord Cairns' Act (21 & 22 Vict. c. 27, s. 2) provided as follows: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."

Should the remedy be injunction or damages?

Lord Cairns' Act.

This Act was discussed in many cases, the effect of which was stated in *Cooper v. Laidler* (*y*) as follows:—The Act gives jurisdiction to substitute damages for an injunction (1) where the plaintiff asks for a mandatory injunction, or (2) for an injunction to restrain a continuing nuisance, but (3) where an injunction is asked to restrain a threatened injury, the jurisdiction is doubtful. See *Martin v. Price* (*z*) and *Dreyfus v. Peruvian Co.* (*a*). In one case decided under Lord Cairns' Act the plaintiff claimed a mandatory injunction to restrain building on a passage over which he had a right of way, and the defendant contended that only damages should be given. Jessel, M.R., granted a mandatory injunction, saying: "If I acceded to the defendant's view, I should add one more to the number of instances which we have, from the days in which the Bible

(*t*) *Wicks v. Hunt*, 1859, John. 372; 123 R. R. 187; *Cooper v. Hubbard*, 1860, 30 Beav. 160; *Gaskin v. Balls*, 1879, 13 Ch. D. 324; *Young v. Star Omnibus Co.*, 1902, 86 L. T. 41. See *Hogg v. Scott*, 1874, 18 Eq. 444; 43 L. J. Ch. 705; *Smith v. S.*, 1875, 20 Eq. 503; 44 L. J. Ch. 630.

(*u*) *Johnson v. Wyatt*, 1863, 2 D. J. &

S. 18; 33 L. J. Ch. 394; 139 R. R. 8; *Turner v. Mirfield*, 1865, 34 Beav. 390; 145 R. R. 571.

(*x*) See *Ferguson v. Wilson*, 1866, 2 Ch. 77.

(*y*) 1903, 2 Ch. 339; 72 L. J. Ch. 578.

(*z*) 1894, 1 Ch. 376; 63 L. J. Ch. 209.

(*a*) 1889, 43 Ch. D. 316; 58 L. J. Ch. 758.

was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour the man of small possessions of his property with or without adequate compensation" (b).

Since the Jud. Act each division of the High Court has full power, apart from Lord Cairns' Act, to do complete justice by granting either an injunction or damages. So that it is not now necessary to have recourse to Lord Cairns' Act (c), for the High Court has a much larger power than it had under Lord Cairns' Act (d).

Should Court
grant
injunction or
damages ?

The appropriateness of the comparative remedies of an injunction or damages was discussed in a long line of cases (chiefly relating to the easement of light), and the effect of many of these cases was thus stated in the last edition of this treatise :—

Where the defendant has erected or substantially erected his building, either after action brought, or otherwise with notice of the plaintiff's right and in defiance of his protests, the judges have absolutely refused to allow him to compensate the plaintiff with damages, but have forced him to pull down his buildings (e). But, except for such cases of wilful breach of duty, the Courts have declined to fetter their discretion by laying down any absolute rule and have considered each case upon its own circumstances. The tendency of the earlier decisions (f) was to award damages in preference to a mandatory injunction whenever the injury to the plaintiff could be reasonably estimated in money—whenever, in fact, the injury was not "irreparable" except by the restoration of the status quo ante. But, more recently, the inclination of the judges was to exercise the discretion only in cases where the damage to the plaintiff, although not so trifling as to exclude the jurisdiction altogether, was yet small in amount and capable of being amply compensated by a money payment, and when there were special circumstances which would make it oppressive to grant an injunc-

(b) *Krehl v. Burrell*, 1887, 7 Ch. D. 535; 48 L. J. Ch. 252; 11 Ch. D. 146.

(c) *Sayers v. Collyer*, 1884, 28 Ch. D. 108; 54 L. J. Ch. 1; *Serrao v. Noel*, 1885, 15 Q. B. D. 559.

(d) *Elmore v. Pirrie*, 1887, 57 L. T. 335.

(e) *Smith v. S.*, 1875, 20 Eq. 500; 44 L. J. Ch. 630; *Gaskin v. Balls*, 1879, 13 Ch. D. 324; *Greenwood v. Hornsey*, 1886, 33 Ch. D. 471; 55 L. J. Ch. 917; *Lawrence v. Horton*, 1890, 59 L. J. Ch. 440; 62 L. T. 749; 38 W. R. 555; *Parker v. Stanley*, 1902, 50 W. R. 282.

(f) *Johnson v. Wyatt*, 1863, 2 D. J. & S. 18; 33 L. J. Ch. 394; 139 R. R. 8; *Isenberg v. East India House Estate Co.*, 1863, 3 D. J. & S. 263; 33 L. J. Ch. 392; 142 R. R. 58; *Bowes v. Law*, 1870, 9 Eq. 636; 39 L. J. Ch. 483; *Batt v. Derby*, 1874, referred to by Jessel, M.R., 18 Eq. p. 555, and by Kekewich, J., 63 L. T. 381; *Stanley v. Shrewsbury*, 1875, 19 Eq. 616; 44 L. J. Ch. 389; *National Co. v. Prudential Co.*, 1877, 6 Ch. D. 757; 46 L. J. Ch. 871; *Holland v. Worley*, 1884, 26 Ch. D. 578; 54 L. J. Ch. 268.

tion (*g*). It seems also that damages might be awarded even for injury done after the issue of the writ (*h*), and possibly for injury which may be expected to accrue after judgment (*i*).

On the same question, viz., whether an injunction or damages should be granted, the cases before *Colls v. Home Stores* (*k*) laid down the following principles as to the form of relief :—When a legal right has been established the plaintiff is *primâ facie* entitled to an injunction (*l*). And in cases of continuing actionable nuisance the jurisdiction to award damages ought only to be exercised under very exceptional circumstances (*m*). Damages may be given in substitution for an injunction where the following requirements exist, viz., where the injury to the plaintiff's legal right (1) is small ; (2) is capable of being estimated in money ; (3) can be adequately compensated by a small money payment ; and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*n*). The conduct of the parties may make damages the more appropriate remedy (*o*).

In *Colls v. Home Stores* (*p*) the rule to be followed by the Court in granting damages or an injunction where the easement of light is in question was laid down by Lord Macnaghten as follows :—“ In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money ; if the defendant has acted in a high-handed manner ; if he has endeavoured to steal a march upon the plaintiff, or to evade the jurisdiction of the Court. . . . But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to

(*g*) *Senior v. Pawson*, 1866, 3 Eq. 330 ; *Aynsley v. Glover*, 1874, 18 Eq. 554 ; 43 L. J. Ch. 777 ; *Smith v. S.*, 1875, 20 Eq. 500 ; 44 L. J. Ch. 630 ; *Allen v. Ayres*, 1884, W. N. 242 ; *Dicker v. Popham*, 1890, 63 L. T. 379 ; *Young v. Star Omnibus Co.*, 1902, 86 L. T. 41.

(*h*) *Davenport v. Rylands*, 1865, 1 Eq. 302 ; 35 L. J. Ch. 204 ; *Fritz v. Hobson*, 1880, 14 Ch. D. 542 ; 49 L. J. Ch. 735 ; *Chapman v. Auckland*, 23 Q. B. D. 298 ; 58 L. J. Q. B. 584.

(*i*) See *Dicker v. Popham*, *ubi sup.*

(*k*) 1904, A. C. 192 ; 73 L. J. Ch. 484.

(*l*) *Martin v. Price*, 1894, 1 Ch. 285 ; 63 L. J. Ch. 209 ; *Shelfer v. City of London Co.*, 1895, 1 Ch. 287 ; 64 L. J. Ch. 216 ; *Jordeson v. Sutton Co.*, 1899, 2 Ch. 217 ; 67 L. J. Ch. 666. See

Cowper v. Laidler, 1903, 2 Ch. 341 ; 72 L. J. Ch. 578.

(*m*) *Shelfer v. City of London Co.*, 1895, 1 Ch. 316 ; 64 L. J. Ch. 216.

(*n*) The above was stated by A. L. Smith, L.J., to be a “good working rule” (*ib.* 322).

(*o*) *Ibid.* ; *Senior v. Pawson*, 1866, 3 Eq. 330.

(*p*) 1904, A. C. 192 ; 73 L. J. Ch. 484. See also *Kine v. Jolly*, 1905, 1 Ch. 496, 504 ; 74 L. J. Ch. 174, where Cozens-Hardy, L.J., says that the tendency of the speeches in *Colls v. Home Stores*, *sup.*, is to go a little further than was done in *Shelfer v. City of London Co.*, *sup.*, and to indicate that, as a general rule, the Court ought to be “less free in granting mandatory injunctions than it was in years gone by.”

incline to damages rather than an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished without an Act of Parliament. On the other hand, the Court ought to be careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

Cases in which relief has been granted by way of injunction.

The cases in which the remedy by way of injunction has been applied by the Court include cases of (1) interference with rights of light; (2) interference with rights in respect of air; (3) nuisance; (4) interference with rights of way; or (5) with rights of water, or (6) with rights of support.

1. *Injunctions against Interference with Rights of Light.*

Light.
Yates v.
Jack.

In *Dent v. Auction Mart* (q) Wood, V.-C., referred to earlier authorities and adopted the form of injunction settled by Lord Cranworth in 1866 in *Yates v. Jack* (r). This order (the form of which was followed until 1904) restrained the defendant "from erecting any building so as to darken, injure or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected which would cause any such obstruction." Lord Cranworth in the same case, following *Stokes v. City Offices* (s), added a proviso enabling the parties to come before the chief clerk in order to have it ascertained whether any proposed addition to the building would or would not be a violation of the injunction; but this proviso was not inserted as a matter of course in subsequent orders.

Since it was definitely laid down in *Colls v. Home Stores* (u) that the easement of light confers only the "right to be protected against a particular form of nuisance," and not the right to the whole of the light as it was previously enjoyed, the form of the order in *Yates v. Jack* is not appropriate as it stood. It was disapproved as a common form order in *Colls' Case* (x), and suggestions for an alteration in the form of order were made by Lord Macnaghten: "The common form of order which has been in use since the case of *Yates v. Jack* is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should

(q) 1866, 2 Eq. 238; 35 L. J. Ch. 555.

(r) 1866, 1 Ch. 295; 35 L. J. Ch. 539.

(s) 1865, 2 H. & M. 650; 144 R. R. 293.

(u) 1904, A. C. 179; 73 L. J. Ch. 484.

(x) Per Lord Macnaghten, at p. 193; per Lord Davey, at p. 201; per Lord Lindley, at p. 207.

restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for the plaintiff's apprehensions, an order, I think, might be conveniently made in that form with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised." In *Anderson v. Francis* (y) Swinfen Eady, J., following the above suggestions of Lord Macnaghten, granted an injunction restraining the defendants from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiffs' ancient windows as the same existed previously to the commencement of the alterations in the defendants' buildings. The defendants were ordered to pay the costs of the action up to and including the hearing, and liberty was given to the plaintiffs to apply, not later than three calendar months after receiving notice from the defendants that their new building had been completed, for further relief by way of mandatory injunction or damages, as they might be advised. The order in the form suggested by Lord Macnaghten has now been adopted as the common form order (z).

Present form
of order.

There are cases (a) where the Court, after deciding that there is an obstruction to be restrained, has, by consent of the parties, referred it to a surveyor to say what alteration will be sufficient to remedy the obstruction. Thus, in *Abbott v. Holloway* (b) an order was by consent made to refer it to an independent surveyor to determine whether the erection of the defendants' buildings, having regard to the increased height thereof, would depreciate to any and what extent the value of the plaintiffs' premises; the defendants to pay to the plaintiffs the sum (if any) so determined; the surveyor to be agreed upon by the parties, or in default to be appointed by the judge and his fees to be borne by the parties equally; the defendants to pay the plaintiffs' taxed costs of the action; the surveyor not to be attended by any one on behalf of the parties, or to take evidence.

Reference to
experts.

(y) 1906, W. N. 160.

(z) See the orders made in *Higgins v. Betts*, 1905, 2 Ch. 217; 74 L. J. Ch. 621; *Andrews v. Waite*, 1907, 2 Ch. 500, 510; 76 L. J. Ch. 676; and *Vere v. Minter*, 1914, W. N. 89. Other forms of injunctions dealing with the obstruction of ancient lights are given

in Seton, 7th ed., pp. 553 et seq.

(a) *Jessel v. Chaplin*, 1856, 2 Jur. N. S. 931; 104 R. R. 983; *A.G. v. Merthyr Tydfil*, 1870, W. N. 148; but see *A.G. v. Colwyn Hatch*, 1868, 4 Ch. 146; 30 L. J. Ch. 265.

(b) 1904, W. N. 124.

It was said not to be the practice of the Court on interlocutory motion to appoint an expert to report to the Court at the trial of the action (c).

Light.

In *Colls v. Home Stores* (d) Lord Macnaghten made the following observations (e): "It will be observed that in *Back v. Stacey* (f) the learned judge told the jury who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now a judge who exercises the functions of both judge and jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the Court does not more frequently avail itself of the power of calling in a competent adviser to report to the Court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in Court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor, but in my opinion the Court ought to have obtained such a report for its own guidance."

It is doubtful whether a judge should himself visit the premises in question and use his own senses to ascertain whether an injury has been committed; for he may be mistaken, and it is his duty to decide on sworn evidence (g).

2. Injunctions against Interference with Rights in respect of Air.

Air.

It is improper in injunctions to restrain interference with rights of light to couple as a general rule injunctions to restrain interference with rights of air. For an injunction to protect air is not granted

(c) *Stokes v. City Offices*, 1865, 13 W. R. 537; 44 R. R. 293; *Baltic Co. v. Simpson*, 1876, 24 W. R. 390, where Jessel, M.R., pointed out that in *Kelk v. Pearson*, 1871, L. R. 6 Ch. 809, the motion was treated as the hearing, and said that this was probably so in *Cartwright v. Last*, 1876, Seton's Decrees, ed. 6, p. 567; 1876, W. N. 60. The order in the last-mentioned case was made upon motion, but concluded: "and it is ordered that the further hearing of the said motion do stand over until after such report as aforesaid shall have been made, when any of the parties are to be at liberty to apply to have this action disposed of, and at such further hearing of the said

motion, or hearing of the said action, both parties are to be at liberty to examine the said referee *vivâ voce*." See *Leech v. Schweder*, 1874, 9 Ch. 463; 43 L. J. Ch. 232, where at the trial a surveyor was appointed to report; and see now R. S. C., Ord. 50, rr. 3, 4; Ord. 55, r. 19.

(d) 1904, A. C. 179; 73 L. J. Ch. 484.

(e) 1904, A. C. at p. 192.

(f) 1826, 2 C. & P. 465; 31 R. R. 679.

(g) *Jackson v. Newcastle*, 1864, 3 D. J. & S. 275; 142 R. R. 64; *Leech v. Schweder*, 1874, 22 W. R. 292; 43 L. J. Ch. 232.

unless a separate case be made for it (*h*). Where, however, a separate case is made in respect of air, injunctions have been granted by the Courts (*i*).

3. *Injunctions against Nuisance.*

The meaning of the term "nuisance" has been discussed ante, Nuisance. p. 393, and various kinds of nuisance dealt with by the Court (including interferences with natural rights in respect of air) have been enumerated ante, p. 395. Where an injunction is granted, the form depends on the nature of the nuisance. A number of these forms will be found in Seton on Decrees, 7th ed., pp. 595 et seq.

4—6. *Injunctions against Interference with Rights of Way ; or with Rights of Water ; or with Rights of Support.*

Forms of injunctions against interference with rights of way will be found in Seton, 7th ed., p. 574; against interference with a party's rights in respect of the flow or user of water, Seton, p. 582; and in respect of his right to purity of water, Seton, p. 605. Forms of injunctions against interference with the right of support are given in Seton, 7th ed., p. 565.

Way ;
water ;
support.

The remedy by injunction has also been applied by the Court in the case of contracts. Where a right claimed is clearly shown to exist by contract, express or implied, and the contract can only be effectually enforced by injunction, the Court will interpose. In *Martin v. Nutkin* (*k*), a bill was filed for an injunction against the churchwardens, &c., of Hammersmith "to stay the ringing of the five o'clock bell": the Court granted the injunction during the lives of the plaintiffs and the survivors of them, as the defendants had agreed not to ring the five o'clock bell upon consideration that the plaintiffs should build a cupola to the church, which they accordingly did, and the bell was silenced for two years, after which the annoyance took place (*l*). Where an injunction was granted against heating water contrary to agreement, it was laid down that where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of

Remedy by
injunction.
Contracts.

(*h*) See ante, p. 307.

(*i*) *Chastey v. Ackland*, 1895, 2 Ch. 391, 392; 64 L. J. Q. B. 523; *Cable v. Bryant*, 1908, 1 Ch. 260; 77 L. J. Ch. 78; *Dent v. Auction Mart*, 1866, 2 Eq. 238, 255; 35 L. J. Ch. 555. See *Aldin v. Latimer*, 1894, 2 Ch. 437—447; 63 L. J. Ch. 601; see also the cases in

which injunctions have been granted against nuisances.

(*k*) 1724, 2 P. Wms. 266.

(*l*) Cf. *Phillips v. Treeby*, 1862, 3 Giff. 632; 133 R. R. 209; *Smart v. Jones*, 1864, 33 L. J. (N. S.) C. P. 154; *Nuneaton v. General Sewage Co.*, 1875, 20 Eq. 127; 44 L. J. Ch. 561.

covenant affords sufficient ground for the Court to interfere by injunction (*m*). "There is a manifest distinction between cases depending on nuisance and those depending on contract. Where there is a contract the Court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; the main point is whether the contract has been broken" (*n*). The Courts, moreover, will enforce by injunction contracts for the creation or protection of rights (e.g., privacy or a prospect) which do not exist apart from contract (*o*).

Remedy by
injunction.

Public
interests.

Public utility
no answer.

There remain to be noticed some cases in which public interests were involved in the granting of an injunction. It was said that, if what is complained of be in its nature useful and necessary to the public, though productive of inconvenience to individuals, as a small-pox hospital, the Court will not interfere by injunction; and *Baines v. Baker* (*p*) was referred to. But in that case there does not appear to have been anything really amounting to a nuisance at all (*q*); and the judgment of Wood, V.-C., in *A.-G. v. Birmingham Council* (*r*) shows that, if a nuisance be proved in fact, it is immaterial whether the nuisance is committed for the benefit of a private individual or many (*s*).

The mere fact that a nuisance is of a public nature will not in equity more than in law prevent individuals from applying to the Court for protection, if they sustain special damage thereby. "It is going too far," said Lord Eldon in *Crowder v. Tinkler* (*t*), "to say that, if a plain nuisance is attended with particular and special damage to an individual, producing irreparable damage, that individual shall not be at liberty to come here unless the Attorney-

(*m*) *Tipping v. Eckersley*, 1855, 2 K. & J. 264; 110 R. R. 216; *Dickenson v. Grand Junction Co.*, 1852, 15 Beav. 260; 92 R. R. 410.

(*n*) *A.-G. v. Mid-Kent R. Co.*, 1867, 3 Ch. 104. Compare the language of Lord Cairns in *Doherty v. Allman*, 1878, 3 A. C. 720.

(*o*) See ante, p. 305.

(*p*) 1752, Amb. 153; 3 Atk. 750.

(*q*) See the comments of Kindersley, V.-C., in *Sollau v. De Held*, 1851, 2 Sim. N. S. at p. 148; 21 L. J. Ch. 153; 89 R. R. 245.

(*r*) 1858, 4 Kay & J. 528; 116 R. R. 445.

(*s*) See also *A.-G. v. Luton*, 1856, 2 Jur. N. S. 189; 106 R. R. 929; *Lillywhite v. Trimmer*, 1867, 36 L. J. Ch. 525; *A.-G. v. Colney Hatch*, 1868, 4 Ch. 146; 30 L. J. Ch. 265; *A.-G. v. Gee*, 1870, 10 Eq. 131; *Vernon v. St.*

James, 1879, 16 Ch. D. 449; 49 L. J. Ch. 130; *Metropolitan District v. Hill*, 1881, 6 App. Cas. 193; 50 L. J. Q. B. 353; *A.-G. v. Acton*, 1882, 22 Ch. D. 221; 52 L. J. Ch. 108. Distinguish *A.-G. v. Dorking*, 1882, 20 Ch. D. 595; 51 L. J. Ch. 585, where the nuisance existed before the commencement of the defendants' powers; *L. & B. R. Co. v. Truman*, 1885, 11 App. Cas. 45; 55 L. J. Ch. 354, where the Railway Acts are treated as expressly authorizing a nuisance. In *A.-G. v. Manchester*, 1893, 2 Ch. 87; 62 L. J. Ch. 459, it was suggested, but not decided, that on an application to restrain a public nuisance some weight might be given to this consideration. And see *A.-G. v. Nottingham*, 1904, 1 Ch. 681; 73 L. J. Ch. 512.

(*t*) 1816, 19 Ves. 621; 13 R. R. 267.

General chooses to accompany him." Thus, too, in *Spencer v. London and Birmingham R. Co.* (*u*), where individuals sustained injury from a public nuisance, quite distinct from that which was inflicted by it on the public, a bill might be filed by those individuals to be relieved from the nuisance (*x*).

(*u*) 1836, 8 Sim. 193; 7 L. J. (N. S.) Ch. 281; 42 R. R. 159.

(*x*) Vide etiam *London v. Bolt*, 1799, 5 Ves. 129; *Sampson v. Smith*, 1838, 8 Sim. 272; *Soltau v. De Held*, 1851, 2 Sim. N. S. 133; 21 L. J. Ch. 153; 89

R. R. 245; *Liverpool v. Chorley*, 1852, 2 D. M. & G. 852; 95 R. R. 347; *Cook v. Bath*, 1868, 6 Eq. 177; *Fritz v. Hobson*, 1880, 14 Ch. D. 542; 49 L. J. Ch. 735.

INDEX.

ABANDONMENT. *See* EXTINGUISHMENT.

- in the case of rights of water, 468.
- rights of light, 471 *et seq.*, 479.
- rights of way, 483 *et seq.*

ABATEMENT OF NUISANCE OR OBSTRUCTION, 499 *et seq.*

- apprehended injury, whether justifies, 497.
- by person injured is justified, 499.
- care required in, 385, 502.
- disposal of material after, 503.
- on neighbour's soil, 500.
- on own soil, 500.
- request to remove, in what case required, 501.
 - either to lessor or lessee sufficient, 502.
- trespass for purpose of, justified, 499.
 - when notice should be given, 502.
- unnecessary damage not to be done in, 502.
 - whether difference herein in respect of public nuisance, 502.
 - when justified by danger or apprehension of disturbance, 498.

ABUTTALS

- in conveyance, easement implied from, 110.

ACCESSIONS

- to natural stream, right to, 278.

ACCIDENT. *See* ACTION; ACT OF GOD.

ACQUIESCENCE,

- breach of restrictive covenant in, may operate as release, 83.
- by person incapable of resisting will not be inferred, 210 *et seq.*, 237.
- Effect in equity,*
 - to give title to easement, 66.
 - by company, 69.
 - by infant, 69.
 - by reversioner, 69.
 - what amounts to, 68.
 - to prevent Court from enforcing right by injunction, 529.
 - amounting to abandonment, 482.
- Effect of, at law,*
 - in acts adverse to the existence of easements, 61, 460, 482.
 - what amounts to, 482.
 - in interruption of enjoyment, under Prescription Act, 201, 233, 237

ACQUIRED EASEMENTS

- in running water, 262.

ACQUISITION OF EASEMENTS, 33 *et seq.* *See* GRANT; PRESCRIPTION.

by grant, constructive, 66.

express, 33, 35, 77.

in equity, 63.

may be by agreement without deed, 64

must at common law have been under seal, 62.

except in case of co-parceners, 36.

implied, 109.

by acquiescence, 66.

of continuous and apparent easements, 113, 114

of ways, 135.

on disposition by will, 131, 144, 150.

lost, 186.

not put an end to by Prescription Act, 193.

title may be obtained by, after twenty years' enjoyment,

186, 213.

by parol agreement,

in equity, 64.

old common law rules, 62.

by prescription, 181.

duration of enjoyment necessary for, before the Prescription Act,
183.

under the Prescription Act,
193.

ACT OF APPROPRIATION.

not required for acquisition of right to water, 252.

ACT OF GOD,

action does not lie for consequence of, 411.

ACT OF PARLIAMENT. *See* STATUTE.ACTION. *See* DAMAGES; DISTURBANCE; INJUNCTION; NEGLIGENCE;
SUBTERRANEAN WATER.

by reversioner, 505.

pleading in, 510.

whether lies for damage without specific injury, 522.

for disturbance of easement, 503.

against maintainer of nuisance, 512.

landlord, 513.

by reversioner, 505.

pleading in, 510.

by several with common interest, 505.

notice, when must be given before, 512.

parties to,

defendant, 512.

plaintiff, 504.

pleadings, 517.

lies for infringement of right, though no actual damage, 522.

to support, where buildings, 357, 373.

injury accidentally occasioned in doing a lawful act, when, 383.

negligence in fact, when, 384.

law always, 383.

trespass in respect of support, whether, 366.

ACTION—*continued*.

- on the case, 202, 517.
- what interest in dominant tenement necessary or sufficient to support action for disturbance, 504.
- who may be sued, 512.
- who may sue, 504.

ACTUS, 314.**AFFIRMATIVE EASEMENTS**, 26.

- acquisition of, may be resisted by action, 26, 366.
- instances of, 26.
- whether right to support is, 366.

AGREEMENT

- enforced by injunction, 535.
- not under seal, is parol though written, 460.
- under seal. *See* GRANT.
- valid though not under seal, 64.
- not in writing, if executed or acted upon, 64.

AIR. *See* LIGHT.

- common law respecting, how far resembling light, 307.
- easement of, 309.
- not to be always coupled with light, 307.
- right not to have air polluted not an easement, 311.
- right to free passage of, to windmill, 308.
- to windows, 310.

ALTERATION OF DOMINANT TENEMENT. *See* ENCROACHMENT;
EXTINGUISHMENT.

- effect of, during period of prescription, 465 *et seq.*
 - in working extinguishment of,
 - continuous easements, 465.
 - discontinuous easements, 490.
 - on right of way, 324, 442.
- encroachment by, 465, 470.
- for purpose of rebuilding, 463, 464.
- increasing burden on servient tenement by, 465, 491.
- in mode of enjoyment of easement does not defeat the right, 468.
- legal inference that owner intends to preserve rights on, 464.
- permanent, effect of, 463.
- restoration after, effect of, 480.

ALTERATION OF PLANE OF WINDOW,
effect of, 475.**AMERICA**,

- law of, as to light, 7, 303.
 - loss of right of way by non-user, 482.
 - repair of upper and lower stories, 422.
 - support, 7, 372.
 - watercourses, 241, 447.

ANCIENT LIGHTS. *See* LIGHT.

ANGLE OF FORTY-FIVE DEGREES, 300.

no hard and fast rule, 301.

provisions of Metropolis Management, &c. Act with regard to, 301.

ANIMALS,

dangerous, when damage by, actionable, 413.

liability for enticing animals on to land and injuring, 412.

APERTURE,

defines access of light under s. 3 of Prescription Act, 198.

required for acquisition of easement of air, 309.

light, 290.

skylight is sufficient, 290.

APPARENT AND NON-APPARENT,

division of easements into, 29.

“ APPERTAINING AND BELONGING,”

construction of, 88.

conveyance includes easements, &c. since Conveyancing Act, 1881. . 84.

APPROPRIATION. *See* WATERCOURSE; LIGHT.

first, does not confer right in excess of natural right, 251.

right to flow of stream in its natural course, independent of, 252.

to confer right in excess of natural light,

1. Must be continued for period sufficient to create easement, 262.

2. Must actually affect others during that period, 262.

of artificial and temporary watercourse confers no right to continuance of it, 273, 279.

APPURTENANCES,

effect of express grant of, 83, 85.

pass on conveyance of tenement to which they appertain, 83.

severance of dominant tenement, 88.

right unconnected with enjoyment of land cannot be appurtenant to land, 17.

ARTIFICIAL WATERCOURSE, 271.

repair of, falls on dominant owner, 433, 434.

right to discharge or receive water by permanent, acquisition by enjoyment, 272.

by temporary, 279.

rights of riparian owners on, may be same as on natural stream, 273.

ARTIFICIAL WORKS,

repair, falls on dominant owner, 433.

AS OF RIGHT,

gate kept locked will not prevent user of right of way being, 228.

pleading must state enjoyment to have been, when, 518.

when enjoyment must be, 223.

ASPHALTUM,

right to support from, 345.

ASSIGNEE

- liable for continuance of disturbance, 21.
- request to, to remove nuisance on land, when required, 501.
- whether bound by acquiescence of assignor, 70.

ASSIGNMENT

- of land passes its easements, 83.
- if of part of land, easements apportioned, 86, 448.

ASSIGNS,

- right of way for, extends to all licensees, 335.
- who included in term, 335.

BANK,

- parol licence to lower, 43.
- spoil, right to make, is an affirmative easement, 27.

BANKS SEPARATING FIELDS,

- ownership of, 409.

BED OF RIVER,

- ownership of, 242.
- right to drive pile into, is an affirmative easement, 27.

BEYOND THE SEAS,

- no provision in Prescription Act for person, 204.

BOUNDARY BUILDINGS, 418.

BOUNDARY DITCHES, FENCES, TREES. *See* DITCHES; FENCES; TREES.

BREWERY,

- nuisance by, 396.

BRIDGES,

- liability to repair, noticed, 430, 431.

BRINE

- may be abstracted by operations on adjoining land, 260.
- subsidence caused by pumping, 260.

BUILDING. *See* OVERHANGING BUILDINGS.

- badly constructed, whether entitled to support, 372.
- effect of grant for purpose of, 16, 111.
- entitled to support must be kept in repair, 371.
- increase of weight of land by, effect of, on natural right of support, 357.
- no natural right to support of land burdened with, 357.
 - of, from other buildings, 373.
- pulling down to repair or rebuild does not involve loss of easements, 444, 462, 463, 464.
- right to support for, acquired by twenty years' enjoyment, 370, 374.
 - by adjacent land, none at common law, 357.
 - by adjoining building, 373.
 - by grant of land with buildings erected, or for purpose of building, 111, 372.

BUILDING—*continued.*

- support of, by adjacent land, can be acquired by prescription, 370.
 - none at common law, 357.
- by building, acquired by prescription, 373
 - no natural right, 373.
- water supporting, no right to continuance of, 344.

BUILDING ACT,

- effect on easements, 459.
- party walls, 408.
- windows, 301, 459.

BUILDING LAND,

- effect of description as, on easement of light, 85.

BURDEN

- on servient tenement must not be increased, 371, 440, 443, 449, 470, 475, 491.

BURIAL,

- right to bury in another's vault is an easement, 29.

CANAL,

- acquiescence in water being taken from, 73, 76.
- adverse right to water of, contrary to use to which water is appropriated
 - by statute, 187.
- diversion of water for, 279.
- right of persons licensed by owners of, to take water, 282.
- right to support for, 112, 355.

CARE REQUIRED IN ABATING, 502.

CASE,

- action of, 517.

CATTLE. *See* FENCES.

- damage to, through want of repair of fence, 410, 413.
- pasturing, 19.
- trespass of, 410, 413.

CELLAR FLAP IN HIGHWAY,

- nuisance by, 392.

CESSATION OF ENJOYMENT, 462 *et seq.*, 480 *et seq.* *See* EXTINGUISHMENT.

CHANNEL FOR WATERCOURSE

- must be defined, 254, 255.

CHURCH,

- way to, 313.
- a way of necessity, 167.

CLAM,

- easement cannot be acquired by secret user, 225, 372, 373, 379.

CLOTHES,

easement to hang, 26.

COALS,

licence to stack, 54.

COLLIERY. *See* MINE.

COMING TO NUISANCE, 402.

COMMON,

right of, how acquired under Prescription Act, 195.
in gross, 19.

COMMON ENEMY,

the sea is, 390.

COMMON LAW,

grant of easements at, 62.
prescription at, 186.
not superseded by Prescription Act, 193.
release of easement at, 459.
right by, easement distinguished from, 6.
support, no right to, for buildings at, 357.
right to, for soil at, 344.
at, not taken away by Waterworks Clauses Act, 1847
. . . 353.

COMPANY

bound by acquiescence, 69.

COMPENSATION

for easements, under Lands Clauses or Railways Clauses Act, 458.
for mines, by canals and railways, 354, 355.

CONNECTED WITH USE OF TENEMENT,

easement must be, 17.

CONSENT. *See* ACQUIESCENCE ; LICENCE.

form of, under the Prescription Act, 196, 198, 199.

CONSIDERATION. *See* LICENCE.

for licence does not affect its revocability at law, 62.
necessary in equity, 66.

CONSTRUCTION

of instruments creating easements, 78, 328, 333, 442.
in particular cases of grants of ways, 335.
where right to let down surface claimed, 348.
of words "appertaining and belonging," 88.
"used, occupied, and enjoyed therewith," 91.
of description, 111.

CONSTRUCTIVE GRANT OF EASEMENT,

acquiescence, inferred from, 66.
extent limited by necessity, 70.

CONSTRUCTIVE NOTICE

- of consent or agreement under Prescription Act, what is, 7.
- of restrictive covenants, 82.

CONTENTIOUS ENJOYMENT

- not "as of right," 224.

CONTINUANCE

- of disturbance of easement, fresh action may be brought for, 512.
 - who liable for, 512.
- of nuisance, action for, against whom, 512.
 - damage not recoverable for expectation of, 497

CONTINUOUS AND APPARENT EASEMENTS,

- definition of, 29, 30.
- implied grant of, 113 *et seq.* See 87.
- meaning of continuous, 30.
 - apparent, 30.

CONTINUOUS AND DISCONTINUOUS EASEMENTS,

- easements may be divided into, 29, 462.

CONTRACT

- enforced by injunction, 535.
- for grant of easement, effect of, in equity, 64.
- for sale, effect of, on doctrine of implied grant, 124.
- implication of grant is subject to, 131.

CONTRACTOR,

- liability of employer for acts of, 514.

CONVENIENCE

- of locality does not excuse nuisance, 398.

CONVEYANCE,

- effect of abutments in, 110.
 - description of grantee in, 111.
 - reference to mode of occupation in, 102.
 - purpose of grant in, 111.
- of dominant tenement, easements pass on, 83.
- of two tenements simultaneously, implied grant of easements on, 125.

CONVEYANCING ACT, 1881.

- general words implied by, 84, 103.
 - cases on effect of, 104 *et seq.*
- grant of easements "used and enjoyed" implied by, 84, 91.
- mode of granting easements under, 78.

COPARCENERS,

- exception from rule that things in grant pass only by deed, 36.

COPYHOLD,

- custom not within Prescription Act, 195.
- immemorial custom may be proved notwithstanding Prescription Act, 203.
- support by minerals in case of, 346.

CORPOREAL PROPERTY,

- dominant tenement need not be, 15.
- easement attaches on, 20.

COUNTY COURT,

- jurisdiction in cases of easement, 503.

COVENANT,

- affirmative, does not run with land in equity, 82.
- benefit of, when enforceable by subsequent purchaser, 83.
- burden of, does not run with land at law, 80.
- in equity, 82.
- for quiet enjoyment, effect of, 86.
- may operate as grant of easement, 80.
- running with land resembles easement, 80.

CROWN

- not bound by sect. 3 of Prescription Act, 198.

CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM, 6, 288.

CUSTOM,

- claims by, under Prescription Act, 195, 202.
- easements distinguished from, 4.
- for way to church, 312.
- instances of, 4.
- must be reasonable, 5.
- to let down surface, 348.

CUSTOM OF LONDON

- as to gutters, 115.
- as to lights, no justification in cases under the Prescription Act, 303.
- as to rebuilding on ancient foundations, 303.

CUSTOMARY RIGHTS

- distinguished from easements, 4.
- instances of, 4.

DAMAGE. *See* ACTION ; MINE ; PARTIES TO ACTION ; SUPPORT ; REVERSIONER ; TRESPASSER.

- if must follow, though has not yet, abatement justifiable, 497.
- in doing necessary works, dominant owner must repair, 433.
- permanent, when required to support action by reversioner, 507.
- preventable, whether actionable if caused in doing legal act, 384 *et seq.*
- whether necessary to maintain action, 522.
- without injury, not actionable, 385.

DAMAGES,

- defendant building with his eyes open not let off with, 531.
- for breach of agreement to grant licence, 71.
- in lieu of injunction, 529 *et seq.*
- measure of, in action for injury to reversion, 506 *et seq.*
- undertaking as to, 528.

DAM IN STREAM,

for purposes of mill or irrigation, when lawful, 244, 245.
otherwise requires easement to justify it, 262.

DAMNUM ABSQUE INJURIA,

not actionable, 385.

DANGER,

when will justify abatement, 497.

DANGEROUS ANIMALS. *See* ANIMALS.

DECREASE

in size of window, effect of, 474.

DEED. *See* AGREEMENT; GRANT.

equitable right to easement may be acquired without, 64.
rules at law, 35, 62, 63.
case of coparceners, 36.
for release of easement at law, 459, 460.
Scotland, easement can be created without deed in, 35.

DEFECT IN TITLE,

easement is, 7.

DEFENCE, STATEMENT OF, 521.

DEFINITE,

enjoyment of easement must be, 239.

DEFINITE CHANNEL,

natural rights in water in, 240.
prescriptive rights in water in, 262.

DEFINITION OF EASEMENT, 9.

DEROGATING FROM GRANT,

rule against, 110—112, 261, 311.
applies, although tenement in lease or mortgage, 124, 125.
where intention appears from abutments, in conveyance, 110.
from description of grantee, 111.
from purpose of grant, 111.
rule against, governed by intention and circumstances, 131.
no implied reservation on principle of, 154.
where grant made for express purpose, 111, 311, 373.
buildings already erected, 372.

DESCRIPTION OF GRANTEE,

effect of, in creating easement, 111.

DESTINATION DU PÈRE DE FAMILLE, 109.

DESTRUCTION OF DOMINANT TENEMENT

for purpose of rebuilding, effect of, 444, 462, 463, 482 *et seq.*
permanent, effect of, 463, 482.

DEVIATION,

right to deviate from way, when, 435.

DEVISE,

when grant of continuous and apparent easements implied in, 131.

when right of way implied in, 142, 144, 150, 151.

DIRECTION

of way, by whom determined, 340.

of way of necessity, 178.

DISABILITIES,

provision for, under Prescription Act, 203, 206.

DISCHARGE

of rain water, right of, 28, 270.

of running water, right of, 269.

not bound to continue, of artificial stream, 279.

DISCLAIMER

of easement, effect of, 487.

DISCONTINUOUS EASEMENTS,

definition of, 29.

DISPOSITION

of owner of two tenements, its effect as to easements, 109 *et seq.*

its effect where disposition by will, 131, 142,
144, 150, 151.

its effect where tenements in lease or mortgage, 124, 125.

manner of pleading, 522.

DISTURBANCE OF EASEMENTS, 493 *et seq.* *See* DAMAGE; REVERSIONER.

abatement of, 499.

when notice must be given before, 502.

action for, 503 *et seq.*

when disturbance is continuing, 572.

when notice must be given before, 512.

distinction between action for, and for nuisance, 493.

imminent danger of, may be restrained, 497.

injury must be substantial, 494.

injury must have accrued, 497.

light, test in case of obstruction of, 496.

quia timet, action for, 497.

remedies for, 499 *et seq.*

by act of party, 499. *See* ABATEMENT; REPAIR.

by action, 503. *See* ACTION; INJUNCTION.

when notice must be given before, 512.

slight interference by plaintiff no answer to action for, 497.

what amounts to, 493.

DITCH

separating fields, ownership of, 409.

DIVERSION OF STREAM,

- artificial, rights of riparian owners on, 273.
- for improvement of channel, effect on right to water, 445, 468.
- for purposes of mill or irrigation, when lawful, 245, 248.
- requires easement to justify, 262.
- right to continuance of, 262, 263, 279.

DIVISIBILITY OF EASEMENTS

- on severance of dominant tenement, 86, 448.

DOMINANT TENEMENT,

- alteration of, effect of, 465, 490.
- definition of, 9.
- easement must be connected with use of, 17.
- easements divisible on severance of, 86, 448.
 - but burden on servient tenement must not be increased, *ib.*
- easements pass on conveyance of, 83.
- must belong to different owner from servient tenement, 14.
- whether it must have been actually acquired at date of instrument
 - creating easement, 16, 35.
- owner of, bound to repair artificial works, 433.
 - damage done in doing necessary works, 441.
- has right of repair, 431.
- may not extend his easement. *See* BURDEN.
- pulling down for purpose of rebuilding, 444.
- severance of, effect of, 448.
- what is, 9.

DOOR,

- closing of, not an abandonment of way, 484.
- whether a sign apparent of an easement, 30, 153.

DRAIN. *See* HOUSE.

- abstracting water in neighbour's undefined channel, not actionable, 254, 255.
- implied grant or reservation of, upon severance of house from adjacent property, 116, 154.
- no right to compel continuance of flow of water from, 273, 279.
- opening drain on own land into another's sewer there, action for, 494.
- right to deepen, 438.
- who liable for nuisance from, 513.

DURATION OF EASEMENT

- by implied grant, 134.
- by necessity, 174.

EASEMENTS,

- acquisition of. *See* ACQUISITION OF EASEMENTS ; DEROGATING FROM GRANT ; PRESCRIPTION.
- by express words, 33 *et seq.*
 1. At law, 62.
 2. In equity, 64.

EASEMENTS—*continued.*

acquisition of—*continued.*

by implied grant, 109 *et seq.* See SEVERANCE OF TWO TENEMENTS.

1. Of continuous and apparent easements, 113 *et seq.*
on disposition by will, 131.

2. Of ways, 135 *et seq.*
on disposition by will, 142, 150, 151.

3. Of easements of necessity, 167 *et seq.*

by imputed or constructive grant, 66.
limited by necessity, 70.

by lost grant, 186, 212.

whether it may be for less than fee simple interest, 212, 213.

by prescription,

at common law, 184, 211.

under the Prescription Act, 193 *et seq.*

from whom they may be acquired, 33, 211. And see RAILWAY

COMPANY; REVERSIONER; TENANT FOR LIFE, &c.

classification of, affirmative and negative, 26, 29, 366.

apparent and non-apparent, 29.

continuous and discontinuous, 29, 30, 462. See 87, 114.

deed necessary at common law for grant of, 35.

defect in title, 7.

definition of, 9.

distinguished from common law rights, 6.

customary rights, 4.

licences, 2.

obligations, 2.

profits à prendre, 1.

disturbance of, remedies for, 499. See DISTURBANCE OF EASEMENTS.

what is, 493.

divisibility of, on severance of dominant tenement, 86, 448.

dominant tenement, must be connected with, 17.

need not have been actually acquired at date of
grant, 17, 35.

enjoyment, alteration in mode of, does not defeat easement, 465, 490.

equitable right to, may be acquired without deed, 64.

exchange under Settled Land Acts, grant or reservation of easement on,
34.

exclusive. See EXCLUSIVE USE OF SERVIENT TENEMENT.

express grant of, may exclude servient owner from participation, 442.

extent of, 442.

extinguishment of. See EXTINGUISHMENT.

house about to be built, grant for, 16.

incidents of, 419.

incorporeal hereditament, whether easement can be attached to, 15.

in gross, 12.

cannot be acquired under Prescription Act, 202.

instances of affirmative, 26.

negative, 29.

kinds of, 26. See AIR; LIGHT; NUISANCE; PROSPECT; SUPPORT;
WATER; WATERCOURSE; WAY.

"land" within Vendor and Purchaser Act, 10.

EASEMENTS—*continued*.

- licence, easement distinguished from, 2.
- effect of, 61, 62.
- when revocable, 62, 63.
- methods of claiming prescriptive, 193, 211, 488.
- obligation of, attaches on servient tenement, 14, 20.
- origin of, 31.
- partition under Settled Land Acts, grant a reservation of easements on, 34.
- pleading of, 517, 521.
- qualities of, 9 *et seq.*
 - 1. Incorporeal, 10.
 - 2. There must be two tenements, dominant and servient; devolution of easements, 11.
 - 3. Dominant and servient tenements must belong to different owners. *Quasi* easements, 14.
 - 4. Dominant tenements, nature of, 15.
 - 5. Easements must be connected with enjoyment of dominant tenement, 17.
 - 6. Must be known and usual incident, 20.
 - 7. Imposed on property not person, 20.
 - 8. Cannot confer exclusive use of servient tenement, 21.
 - 9. Confer no right to profits of servient tenement, 22.
 - 10. Cause must by civil law be perpetual, 22.
- release of, see EXTINGUISHMENT.
- rent for, 2, 337.
- secondary, 437.
- severance of dominant tenement, easements attach to severed portions on, 86, 448.
 - of two tenements. See SEVERANCE.
- spurious, to compel servient owner to repair, 412. See PARTY WALLS AND FENCES.
- subjects of, 26.
- tenant for life, powers of, with respect to, 33.
- tenements, there must be dominant and servient, 11.
- term of, whether may be acquired for less than fee simple interest, 77, 213, 217.
- to let down soil, 27, 346.
 - acquisition of by custom, 346.
 - effect of grant of minerals, 349.
 - acquisition of by prescription, 347.
- vague grant of right of way, 340, 341.
- will, creation by, 35, 62.

EAVES,

- easement for, 269.
- not lost by raising roof, 270.
- over neighbour's land, may be abated before actual damage, 498.

EMPLOYER,

- when liable for acts of contractor, 514.

ENCROACHMENT.

care required in removing, 385.
 loss of easement by. *See* ALTERATION OF DOMINANT TENEMENT.
 restoration of dominant tenement after, effect of, 480.

ENJOYMENT TO CONFER EASEMENT,

against whom it must be had, 210 *et seq.* *And see* IDIOT; INFANT;
 MARRIED WOMAN; REVERSIONER; TENANT FOR LIFE, &c.
 by whom it must be had, 219.
 by one tenant against another holding of the same landlord, 214, 216.
 effect of cessation of, 462, 481.
 extent and mode of, 442.
 for whose benefit it enures, 220.
 how commencing, 228, 518.
 light, in case of, 290.
 must be uninterrupted, 224, 201.
 capable of interruption, 236.
 definite, 239.
 must continue down to action, when, 200.
 must not be extended, 442.
 under a mistake, 230.
 not necessary to confer natural right, 6.
 of prospect, confers no right, 304.
 of water percolating underground confers no right, 253, 254.
 Prescription Act, under, 210, 221.
 qualities of, 221 *et seq.*
 ways in cases of, 316.
 what amounts to an interruption of,
 at common law, 224.
 by the statute, 201.

ENLARGEMENT

of window, effect of 473.

EQUITABLE EASEMENTS, 7, 35, 64

EQUITY.

acquisition of easement by agreement in, 64.
 acquiescence in, 66.
 fusion of, with law, 63, 524.
 release of easements may be by agreement in, 460.

ESCAPE

of water, &c. and dangerous substances, liability for, 415.

EVIDENCE

as to extent and nature of easement, when admissible, 78.
 of larger easement will prove a less one, 322.
 as to rights of way, 322.
 of right as against reversioner, 211, 213, 507.

EXCAVATION. *See* PIT.

effect of, on right to support, 344, 371.

EXCESSIVE USER, 442.

continuous easements, 465.
 discontinuous easements, 491.

EXCLUSIVE USE OF SERVIENT TENEMENT,

- for all purposes, easement cannot confer, 21.
- for purpose of an easement, may be conferred, 442.

EXPERT.

- reference to, 533.

EXPRESS GRANT. *See* GRANT.

- construction of instrument, 78 *et seq.*
- deed necessary for, 35, 62.
- deed not necessary for, in Scotland, 35.
- extent and mode of enjoyment where there is, 442.
- of appurtenances, effect of, 85.
- of easements by words "appertaining and belonging," "used and enjoyed," &c., 88 *et seq.*
- referring to occupation, 102.

EXTENSION OF ENJOYMENT, 442.

EXTENT OF EASEMENTS, 442.

EXTINGUISHMENT OF EASEMENTS.

1. By operation of law, 452.
 - union of ownership for absolute interests, 453. *See* UNITY.
 2. By statute, 453.
 3. By express release, 459.
 4. By implied release,
 - From licence given by dominant owner to servient owner, 460.
 - From dominant owner ceasing or altering user, 460.
 - Continuous easements,
 - cessation of user, 462.
 - alteration of user, 465.
 - Discontinuous easements, 480.
 - cessation of user, 480.
 - alteration of user, 490.
- by alteration of dominant tenement. *See* ALTERATION OF DOMINANT TENEMENT.
- alteration of temporary nature, as for purpose of rebuilding not sufficient, 424, 463.
- civil law required some act to be done by the servient owner while such altered status continued, 463.
- quære* if necessary in English law, 464.
- intention to relinquish necessary, 463.
- inferences as to whether dominant owner intends to preserve rights, 464, 479, 527.
- material question—is it the intention of the dominant owner to renounce his right? 463, 482.
- owner of dominant tenement must acquiesce to render abandonment valid, 461.
- permanent alteration of dominant tenement evinces intention to abandon right, 463, 481.
- Prescription Act does not in terms apply to, 461.

EXTRAORDINARY AMOUNT OF LIGHT,

- claim to, 302.

- FASCIA,
 easement to use, 27.
- FEME COVERT,
 disability of, under Prescription Act, 203.
- FENCES. *See* HEDGES ; HIGHWAYS ; PIT.
 common law liability to keep in one's own cattle, 410.
 easement to keep in repair, as against cattle of neighbour, 410.
 General Inclosure Act, provisions of, as to, 412.
 liability for enticing animals on to land and injuring, 412.
 ownership of, 409.
- FISH,
 obstruction of, in river, 249.
 right to, a *profit à prendre*, 1.
 when within Prescription Act, 195.
- FLAP TO CELLAR,
 damage by fall of, when actionable, 392.
- FLAT,
 liability to repair staircase, &c. of landlord and tenant of, 425.
 upper and lower rooms in, 421.
- FORCIBLE ENJOYMENT
 will not confer easement, 224.
- FORGE,
 nuisance from, 42.
- FORM OF GRANT OF EASEMENT, 80.
- FORMED ROAD,
 whether required, that way may pass by implied grant, 153.
- FORTY-FIVE DEGREES,
 rule as to angle of, 300.
- FOULING
 of air, 395.
 of natural stream,
 actionable, 280.
 right of licensee in respect of, 282.
 right of, may be acquired, 280.
 of percolating water, actionable, 280.
- FOUNDATIONS. *See* HOUSE ; SUPPORT.
 digging so as to let down adjoining house, 357.
- FOUNDROUS,
 right to deviate if way becomes, 435.
- FRAUDS, STATUTE OF,
 effect of, on agreement for easement, 10, 64.
 licence to use land not within, 3.
- FRUIT TREES,
 interference with, by overhanging trees on adjoining premises actionable,
 418.
 right to nail to wall is an affirmative easement, 27.

GATE. *See* ABATEMENT.

abatement of, 501.

locking a, across way, action for, 495. *See* 228.

when can be made across a private way, 496.

right of way may be acquired although gate kept locked, 228, 495.

GENERAL WORDS,

“appertaining, belonging,” &c., 88.

deemed to be inserted by Conveyancing Act, 84.

“used, occupied and enjoyed,” 89.

GLAZED TILES

no defence in action for obscuring windows, 298.

GRANT. *See* DEROGATING FROM GRANT.

distinguished from licence, 2, 36, 62, 63.

grantor may not derogate from, 110—112, 261, 311.

lost, doctrine of, 186.

of appurtenances, effect of, 83, 85.

of easement,

constructive, by acquiescence, 66.

is limited by necessity, 70.

what amounts to acquiescence, 68.

express,

construction of instrument, 78.

covenant may operate as, 80.

deed necessary for, at common law, 35, 62.

form of, at common law, 77.

under Conveyancing Act, 78.

under Statute of Uses, 77.

of easements, “appertaining and belonging,” “used and enjoyed,” &c., 88, 89.

whether closes must have been divided before severance, 102.

whether formed track necessary, 101.

by reference to occupation, 102.

construction of, 78.

implied,by rule against derogation from grant, 110. *See* DEROGATING FROM GRANT.case where two tenements are severed. *See* SEVERANCE.

of minerals,

construction of, 349 *et seq.*

effect of, on right to support, 349.

of tenement, carries easements, 83.

for special purpose as for building, &c., implication of grant on, 16, 111, 373.

with buildings erected thereon, 373.

what words sufficient to pass easements, 23 *et seq.*

whether negative easement lies in, 80.

GROSS,

whether easement can be in, 12.

prescription for right in, not within Prescription Act, 202.

profit à prendre, 12, 195.

- HEAT,
 nuisance by, 396.
- HEATING WATER
 of natural stream actionable, 280, 535.
- HEDGES. *See* FENCES.
- HEIGHT,
 not to build beyond a certain height a negative easement, 29.
- HIGHWAY. *See* NUISANCE.
 highway rate, exemption from, of persons liable to repair *ratione tenuræ*, 430.
 liability to repair by prescription or tenure, 430.
 not an easement, 13.
 repair, no right to, where no obligation to, 431.
 rights of public in, 13.
- HOUSE. *See* ABATEMENT ; BUILDING ; SUPPORT.
 grant of land for purpose of building, easements implied on, 16, 111.
 pulling down one or two modern houses, question of support, 385.
 pulling down to repair does not involve loss of easements, 444.
 to be built, grant of easement for, 16, 111.
- IDIOT,
 provision in Prescription Act with regard to disability of, 203.
- IMPASSABLE,
 right to deviate if way becomes, 435.
- IMPLICATION OF SECONDARY EASEMENTS, 437.
- IMPLIED GRANT OF EASEMENTS,
 abutments in the conveyance, from, 111.
 description of the grantee, from, 111.
 how pleaded, 522.
 See further EASEMENTS ; GRANT.
- IMPLIED RESERVATION, 153.
- INCIDENTS OF EASEMENTS, 419.
- INCLOSURE ACT,
 as to fencing, 412.
 extinguishment of easements by, 458.
- INCORPOREAL HEREDITAMENT,
 an easement is, 10.
 created or transferred by deed only, 35. *See* 62, 63.
 whether easement may be accessory to an, 15.
- INCREASE
 of burden of easement, effect of, 371, 440, 443, 449, 470, 475, 491.
 of size of window, 473.

INFANT,

- disability of, under Prescription Act, 203.
- effect of user by, 219.
- whether bound by acquiescence, 69.

INFRINGEMENT OF EASEMENT. *See* DISTURBANCE OF EASEMENTS.INJUNCTION, 524 *et seq.* *See* MANDATORY INJUNCTION.

- against obstruction to light, 532.
 - form of, 533.
- air, to protect, only granted when case made, 307, 534.
- as to effect of acquiescence, 529.
- damages in lieu of, 529.
- in cases of contract, 535.
 - danger, 498.
- inchoate right not protected by, 201.
- injury must be substantial, 526.
 - or continuous, 525.
- interest in premises sufficient to sustain action for, 513.
- interlocutory, 527.
- laches in claiming, 529.
- mandatory, 527.
- not granted unless injury substantial, 526.
 - when injury temporary, 525.
- public nuisance, individual may restrain, by, 536.
- quia timet*, 497.
- undertaking as to damages, where interlocutory injunction granted, 528.
- when granted, 524 *et seq.*

INJURIA,

- always actionable, 522.
- damage without, never actionable, 385.

INSPECTION BY JUDGE, 534.

INTEREST,

- what, sufficient to sustain action for disturbance, 505.

INTERFERENCE WITH EASEMENTS. *See* DISTURBANCE OF EASEMENTS,

- actionable, when, 493.
- in case of water, 252.
- plaintiff's own obstruction no answer to action for, 497.

INTERLOCUTORY INJUNCTION,

- undertaking as to damages, 528.
- when granted, 527.

INTERRUPTION. *See* PLEADING ; PRESCRIPTION.

- Generally, 182.
- Under the Prescription Act, 201.
- enjoyment must be capable of, 236.
- for more than a year before action brought defeats right, 201.

IRRIGATION,

when rivers may be used for, 248.

ITER, 314.

JUS SPATIANDI,

not known to law, 20.

LACHES,

effect of, in equity, 529.

LAND,

covenants running with, 80.

natural right to support for, 543.

what included in expression, under Conveyancing Act, 85.

Vendor and Purchaser Act, 1874..10.

LANDLORD. *See* REVERSIONER.

when liable for obstruction by tenant, 513.

LANDS CLAUSES ACT,

compensation under, 458.

limited owner has no power to grant easement under, 33.

LEASE,

easements appurtenant pass by, 83.

implied over lessor's land, 124.

not over land subsequently acquired by lessor, 134.

where other tenement in lease, 124.

effect of covenant for quiet enjoyment, 86.

general words in creating easements, 88, 104.

effect of, on doctrine of implied grant, 124.

exclusive of term of, in computing time under Prescription Act, 204.

of mines, effect of, on right to support, 349.

LEGALIZATION OF PRIVATE NUISANCE, 403.

LENGTH OF TIME. *See* PRESCRIPTION.

LEX NON FAVET DELICATORUM VOTIS, 393.

LICENCE.

cannot create an easement, 36, 61, 62.

to bury in particular vault, 42.

to carry on noisy trade, 42.

damage for breach of agreement to grant, 62.

distinguished from easement, 2.

grant, 62, 63.

executed to do act of a permanent kind, may extinguish easement, 61, 460.

grantee of, cannot maintain action against stranger, 3.

nature of, 62, 63.

not assignable, 3.

of riparian owner gives no right to stream, 282, 283.

parol, effect of, 62.

LICENCE—*continued*.

- reasonable notice required of revocation of, 61.
- revocable, 62, 63.
- to use water, effect of, 282.
- whether may be granted without a deed, discussed, 62.

LIGHT, 288 *et seq.* See AIR; PROSPECT.

- a negative easement, 29, 288.
- acquisition of,
 - by acquiescence, 66.
 - by agreement,
 - at common law, by deed, 62.
 - in equity by parol agreement, 64.
 - by description of grantee, 111.
 - by general words deemed to be inserted by Conveyancing Act, 84.
 - effect in such case of notice, 108.
 - of reference to building plan, 108.
 - by implication of grant on sale of house with window, 114
 - although tenement in lease, 124.
 - although tenements in mortgage, 125.
 - or proposed window, 126.
 - or sale of land for purpose of building, 111.
 - not by implied reservation, 153.
 - mere appropriation, 288.
 - by lost grant presumed from twenty years' existence of window, 186, 212.
 - by prescription,
 - at common law, 183.
 - under Prescription Act, 198.
 - acquired absolutely and indefeasibly by twenty years' enjoyment even though tenements in lease, 216.
 - Crown not bound by sect. 3 of Act, 198.
 - enjoyment need not be "as of right," 198.
 - running of time notwithstanding disability of servient owner, 203, 218.
 - by purpose for which grant made, 111.
 - actual user not requisite under Act for acquisition of, 290.
 - America, law, of, as to, 7, 303.
 - angle of forty-five degrees, rule as to, 303.
 - no hard and fast rule, 301.
 - aperture required under Act for acquisition of, 290.
 - skylight is sufficient, 290.
 - bad, how far protected, 303.
 - borrowed light, offer to provide, no defence, 298.
 - custom of London as to, 303.
 - distinguished from natural rights, 6.
 - extent of right to, 296, 302.
 - extraordinary amount of, no claim, to, 302.
 - glazed tiles, offer to put in, no defence, 298.
 - lateral,
 - no natural right to, 288.
 - proof of damage to, 301.

LIGHT—*continued*.

- loss of right to. *See* EXTINGUISHMENT.
- by acquiescing in obstruction of, 61, 460.
- by operation of law. *See* OPERATION OF LAW.
 - union of ownership for absolute interest, 453.
 - unity of possession without ownership, 456.
 - of seisin without unity of possession, 183.
- by taking down without intention to rebuild, 463.
 - or blocking up window, 463.
 - whether adjoining owner must act, 464.
- effect of decrease of size of window, 474.
 - enlarging window, 473.
 - whether house may be restored after, 480.
- right, whether lost by altering situation of window, 471.
 - by altering plane of window, 476.
 - altering use of room, 298.
- under Lands Clauses Acts, 458.
- no implied warranty that house has easement of, 7.
- obstruction of,
 - abatement of, 501.
 - death of plaintiff in action for, 512.
 - injunction to restrain, when granted, 532.
 - must amount to a nuisance, 296.
 - reversioner, whether may sue for, 505, 508.
 - slight diminution by plaintiff no answer, 479.
 - temporary, 525.
 - test of, 296.
 - when damages only granted for, 531.
 - when mandatory injunction granted to prevent, 526.
 - whether substitution of other light any defence, 298.
 - whether tenant of house may be sued for, 513.
- other light,
 - no answer that plaintiff gets additional, 298.
 - whether to be taken into consideration, 298.
- right of railway company to obstruct, 288.
- suspension of right to, 454, 456.
- what amounts to actionable obstruction, 296.
- when house unfinished, 126.

LIME KILN,

- may be a nuisance, 395.

LIMITATIONS, STATUTE OF,

- when time begins to run in case of withdrawal of support, 345.

LOCKS,

- right to open an easement, 29.

LONDON,

- cause of action arising in, can be tried in Mayor's Court, 504.
- custom of, as to gutters, 115.
 - does not prevail against twenty years' enjoyment of light, 303.
 - to rebuild to any height on old foundations, 303.
- party walls, regulated by London Building Act, 1894, 408.

LORD CAIRNS' ACT, 529.

LOSS OF RIGHT. *See* EXTINGUISHMENT.

LOST GRANT,

doctrine of, 186, 194.

evidence admissible to rebut presumption, 191, 192.

incapacity to grant negatives, 192.

objection to, 193.

whether easement can be created for less than fee simple interest by,
212, 213.

rule where acquired under Prescription Act, 214-218.

presumption of, where servient tenement in lease, 213, 214.

pleading, 521.

presumption made where state of affairs otherwise unexplained, 188.

See 194.

title may be obtained by, after twenty years' enjoyment, 188, 192.

LUNATIC OR IDIOT,

disability of, 203.

LYING BY,

effect of, 66.

MANDATORY INJUNCTION,

form of, 526.

when granted, 527.

on interlocutory motion, 527.

MARKET, 19.

way to, a way of necessity, 167.

MARRIED WOMEN,

provision in Prescription Act with regard to, 203.

MAYOR'S COURT,

jurisdiction of, 504.

MEDIUM FILUM AQUÆ.

riparian owner entitled to soil of river to, 242.

MERGER. *See* OPERATION OF LAW.

METROPOLITAN BUILDING ACT. *See* BUILDING ACT.

MILL. *See* WATERCOURSE.

alteration in wheel, effect of, 468,

MILL DAM,

when it may be pulled down, 500.

MILL STREAM,

easements in connection with, 28.

MINE.

Duty of mine owner.

- (a) Not to work so as to let down surface, 346 *et seq.*
 except right to do so granted or reserved, 348, 349. *See* 27.
 effect of Railway and Canal Acts, 353 *et seq.*
 right to let down surface without compensation not acquired
 by custom, 346.
 effect of grant of minerals, 349.
 prescriptive easement to let down, 347.
 not bound to abstain from draining underground water, 260,
 344.
 when right of action accrues for withdrawal of support, 346.
- (b) As to houses and other structures on surface of adjacent soil,
 no duty to support, 357.
 unless houses have stood for twenty years, 360.
 or surface granted for express purpose of erections,
 111, 373.
 with houses existing at time of
 severance, 111, 372.
- (c) As to water,
 discharge of, whether bound to continue, 269.
 grant of right to discharge water, 269, 285.
 not liable for affecting support by letting free subterranean
 water, 344.
 draining off stored water, 255.
 surface water, 255, 260.
 intercepting subterranean water percolating
 through strata, 255.
 not permitted to alter from clean to foul, 280.
 unless easement acquired, 280.
- right to use surface for working, an easement, 27.
- rights incidental to, 169, 439.

MORTGAGEE

- bound by acquiescence, 70.
- sale by, effect of, on doctrine of implied grant, 125.

NAME PLATE,

- easement to affix, 27.
- view of, can be obstructed, 305.

NATURAL RIGHT. *See* LIGHT; SUPPORT; WATERCOURSE.

NECESSITY,

- constructive grant of easement is limited by, 70.
- easement of, 167.
 arises as incident to reservation as well as grant, 168.
 duration of, 174.
 extent of, 174.
 how pleaded, 522.
 implied by law to effect intention, 168.
 both upon grant and reservation, 168.
 only when property cannot be used at all without easement,
 169.

NECESSITY—*continued*.easement of—*continued*.

right measured by nature of grant or reservation, 174.

whether continues after necessity ceases, 174.

extinguished by unity of ownership, 177.

revived on subsequent severance, 177.

extinguishment by, 460.

qualified theory of, 112.

way of, 178.

direction of, 178.

extent of, 174, 325.

NEGATIVE EASEMENT, 26.

instances of, 29.

whether right of support is, 29, 366, 381.

NEGLIGENCE, 383. *See* ABATEMENT.

by public officers, 388.

causing a public nuisance, 391.

in exercising a limited right, 390.

in fact and in law, 383.

in keeping dangerous animals, 413.

in removing support,

when right to support exists, 383.

in other cases, 385, 387.

NEMO TENETUR DIVINARE, 498.

NOISE,

nuisance by, 397, 400.

easement to create,

acquired by user, 403.

or by grant, 404.

licence for, 42.

NON-APPARENT EASEMENTS, 29.

NON COMPOS MENTIS,

provision in Prescription Act with regard to person, 203.

NON-USER,

loss of easement by, 462, 481.

NOTICE,

constructive, of agreement for enjoyment under Prescription Act, 7.

equitable grant of easement defeated by conveyance to purchaser without, 7.

of agreement to grant easement, how affects purchaser, 7. *See* 61.

of covenant affecting land, how affects purchaser, 82.

constructive, sufficient, 82.

of intent to remove support from house, when not required, 385—387.

to remove nuisance, when abatement unlawful without, 502.

when must be given before action, 512.

to trespasser of dangerous instruments for protection of premises, 415.

NUISANCE. *See* ABATEMENT; DISTURBANCE; LEGALIZATION; NOISE;
PIT; PLEADINGS; PUBLIC NUISANCE.

- by brewery, 396.
- by brick-burning, 395.
- by candle-making, 396.
- by cellar flap in highway, 392.
- by crowds obstructing highway, 397.
- by dye house, 395.
- by excavation adjoining footway, 392.
- by fat-melting business, 396.
- by heat, 396.
- by lime kiln, 395.
- by noise, 397.
- by noisy trade, 399, 403.
- by overhanging trees, 418.
- by pig sty, 396.
- by pollution of water, 280.
- by small-pox hospital, 397.
- by soap-boiling, 396.
- by tan house, 396.
- by vibration, 397.
- convenience of locality does not excuse, 398.
- distinguished from disturbance of easement, 393.
- doctrine of coming to, exploded, 402.
- instances of, 395, 396.
- may be legalized by time, 403.
- not excused by convenience, 398.
- obstruction to light must amount to, 296, 473.
- previous notice to abate, when necessary, 502.
- private, legalized by twenty years' existence, 403.
- public, liability for negligence causing, 392.
 - may be restrained at suit of individual, 395, 536.
 - no prescription for, 404.
 - person sustaining special injury may bring action for, 395, 536.
- what amounts to, 393.
- who liable for, 513.

OBLIGATION,

- easement distinguished from an, 2.

OBSTRUCTION,

- abatement of, 500.
- by gate, whether obstruction to private way, 495.
- by trees, whether servient owner liable for, 450.
- to way, how long must be acquiesced in to lose right, 482.
- of light, 496.

OCCUPANCY,

- effect of reference in conveyance to, in creating easement, 102.
- right to water of natural stream does not depend on first, 251.

OCCUPIER,

- when liable for disturbance of easement or nuisance on land, 513.

ONUS OF PROOF

in case of implied grant, 134.

OPERATION OF LAW,

extinguishment of easement by unity when owner of dominant and servient tenements has an estate in fee simple in both of an equally high and perdurable nature, 14, 114, 177, 453.

if estates not in fee and equally high and perdurable easements are suspended only and revive on severance, 454.

ways of necessity, whether extinguished by, 177.

whether easements extinguished by, revive on severance, 114, 177, 455.

unity of seisin without unity of possession, 183.

ORDER IN *YATES v. JACK*, 532.

ORIGIN OF EASEMENTS, 31.

OVERHANGING BUILDINGS, 269, 418.

OVERHANGING TREES, 418.

OWNER OF TWO TENEMENTS,

disposition of, 109 *et seq.*

pleading of, 522.

OWNERSHIP. *See* POSSESSION ; UNITY.

PAROL,

agreement for easement by, 64.

licence by, 62.

PARTICULARS OF SALE,

effect of condition as to building in, 126, 129.

of plan in, 129.

PARTIES TO ACTION FOR DISTURBANCE,

defendant,

employer, when liable for contractor's act or default, 514.

landlord not liable for tenant's act during tenancy, 513.

party actually creating disturbance liable, 512.

stranger, when defendant liable for, 514.

plaintiff,

interest of, what is sufficient to sustain action, 504.

occupier may always sue, 505.

reversioner may, when, 505.

successive occupiers or reversioners may sue for continuance, 512.

PARTITION

under Settled Land Acts, grant or reservation of easements on, 34.

PARTY WALL, 406.

ownership of, 406.

provisions of Building Act as to, 408.

do not authorise obstruction of ancient lights, 459.

rights of co-owners of, 407.

taking down, 407.

PERCEPTION,

act of, whether required to establish natural right to water, 252.

PERCOLATING WATER, 254 *et seq.*

no right to foul, 280.

no right to support from, 344.

but semi-liquid silt or pitch is not, 345.

prescriptive right to flow cannot be acquired, 264.

PERMISSION

to use stream, whether third party can use under, 283.

PERMISSIVE ENJOYMENT, 183, 228.

easement under Prescription Act, effect of, 229.

of water, 281.

PERPETUA CAUSA, 22.

PERPETUITY,

relation of easements to, 8.

PEW,

right to, an easement, 29.

whether within Prescription Act, 197.

PIG STY,

nuisance by, 396.

PIT

on own property, not bound to fence, 413.

when owner liable for, 392, 413.

PLAN,

grant of easement implied from, when in deed, 110.

whether when in particulars of sale, 129.

PLANE OF WINDOW,

effect of alteration of, 475.

PLEADINGS, 517 *et seq.*

alternative pleading of title to easement, 521.

general allegation of right, 520.

reversioner, action by, 524.

under Prescription Act, whether enjoyment as of right must be alleged, 518.

pleadings under Prescription Act, 518, 202.

Judicature Acts, 520.

no reply unless ordered, 521.

POLLUTION

of air, 395, 311.

of water, actionable, 279 *et seq.*

right of licensee in respect of, 281 *et seq.*

right of, may be acquired, 280 *et seq.*

POND,

letting off water, when actionable, 255.

POSSESSION,

- effect of unity of, in extinguishing easements, 453 *et seq.*, 14, 114, 177.
- no prescription during unity of, under Prescription Act, 182.
 - rule in case of light, 199, 216.
- unity of possession without unity of ownership will not defeat prescription at common law, 456.
- unity of seisin without, 183.
- what is, 181.

PRECARIO, 228.

PRESCRIPTION, 181 *et seq.* See LOST GRANT; PRESCRIPTION ACT.

- against landlord, or tenant of landlord, by tenant, 199, 212, 216.
 - reversioner, 213.
 - whom title acquired by, 210 *et seq.*
- by whom title acquired by, 219, 220.
- definition, 181.
- easement to let down soil, 27, 347.
- enjoyment must be uninterrupted, 182, 201, 224.
- none against prescription, 241.
 - for public nuisance, 404.
- qualities of enjoyment required for, 221.
 - capability of interruption, 236.
 - definiteness, 239.
 - nec vi*, 224.
 - nec clam*, 225.
 - nec precario*, 228.
- support for buildings by buildings, whether right can be acquired by prescription, 373.
- support for new buildings may be acquired by twenty years' user, 374.
- title by, at common law, 184.
 - how far abolished by the Prescription Act, 193.
- title by modern lost grant, 186.
- unity of ownership or possession, effect of, 453.

PRESCRIPTION ACT, 193 *et seq.*

- sect. 1, *profits à prendre*, 195.
- sect. 2, ways and other easements, 197.
 - whether applicable to negative easements, 197.
 - not confined to rights of way and water, 197.
- sect. 3, light, 198.
 - acquired by twenty years' enjoyment, even though tenements in lease, 199.
 - building, meaning of, 198.
 - consent or agreement, excluding, 199.
 - may be given by tenant, 199.
 - Crown not bound by section, 198.
 - user need not be as of right, 198.
 - should be as an easement, 198.
- sect. 4, computation of time, 200.
 - must be period immediately preceding action, 200.
 - whether user in first and last years to be proved, 200.

PRESCRIPTION ACT—*continued*.

- sect. 5, form of pleading, 202.
- profits à prendre*, in gross not within Act, 202.
- sect. 6, limitation of presumption, 203.
- sect. 7, disabilities, &c., 203.
- sect. 8, exception from longer period, 204.
- contains no provision as to loss of easements, 461.
- easement must be valid against fee under the Act, 211 *et seq.*
 - case of lost grant, 212.
- effect of, generally, 205.
- extended to Ireland and repeal of obsolete clauses, 205.
- how far Act has superseded earlier methods of claiming prescriptive easement, 193, 488.
- inchoate right only until action brought, 201.
- interruption and acquiescence, 201.
- not applicable to duties, 195.
- Scotland, does not extend to, 205.
- unity of possession defeats claim under, 182.
 - rule in case of light, 199, 216.
- whether easement of support is within, 197, 370.

PRESUMPTION,

- none for user of less than prescribed period, 203.
- of ownership of boundary trees, 415.
 - of ditch and bank, 409.
 - of party wall, 406.
- that superior easement includes equal or lesser, 322.
- in favour of right of support, 349.

PRIVACY,

- no right to, except by contract, 305.

PRIVATE WAY,

- when out of repair, traveller cannot use land adjoining, 435.

PROFITS À PRENDRE,

- digging sand is, 1, 195.
- distinguished from easements, 1, 22.
- fishing is, 1.
- in gross not within Prescription Act, 195.
- may be in gross, 195.
- prescription for, 195.
- right to take water from a spring is an easement, not, 28.
- shooting is, 1.

PROJECTIONS

- in air, over neighbour's land, actionable, 418.

PROPERTY. *See Sic Utere Tuo.*

- easements are accessory to, 17.
- are valuable, 7.
- attach on, 20.
- in air, 254, 307.
- in water of natural stream, 251.
- support, how far a right of, 343, 349, 365.

- PROSPECT,
right of, by contract only, 305.
- PUBLIC BODY,
implied grant of support on conveyance to, 112.
- PUBLIC NUISANCES,
liabilities for, 392.
no prescription for, 404.
restrained at suit of individuals, 395, 536.
- PUBLIC OFFICER,
liability for negligence of, 388.
- PUBLIC UTILITY
no answer to action for injunction, 536.
- PUMP,
right to use, implies right to repair, 432.
- PURCHASER FOR VALUE WITHOUT NOTICE,
agreement for easement not enforced against, 7, 66.
covenant, when enforced against, 66.
- PURPOSE OF GRANT,
effect of reference to, 111.
- QUALIFIED NECESSITY, 112.
- QUALITIES OF EASEMENTS, 9.
- QUALITIES OF ENJOYMENT FOR PRESCRIPTION, 221.
- QUASI* EASEMENTS, 14.
- QUIA TIMET* ACTION, 497.
- QUIET ENJOYMENT,
effect of covenant for, 86.
- RACECOURSE,
custom to use land for, 4.
licence to enter, 48.
- RAILWAY,
liability of, to maintain fences, 412.
may erect hoarding to obstruct light, 288.
right of, to support, 112.
right to mine under, 354.
- RAILWAY ACTS,
remedy of owner of easement over land compulsorily taken under, 458.
- RAILWAY COMPANY,
no power to purchase easement under Lands Clauses Act, 35.
power to grant easement, 34.

RAIN WATER

- gutter, liability to repair, 425.
- right to discharge, an easement, 28, 270.

RATIONE TENURE.

- liability to repair, 430.

RE-BUILDING,

- legal inference as to preservation of rights, 444, 462, 463, 464, 479.
- windows may be restored on, when, 463 *et seq.*, 479.

REFERENCE

- to expert, 533.
- to occupation, in conveyance, effect of, 102.
- purpose of grant, effect of, 111.

RELEASE OF EASEMENTS. *See* EXTINGUISHMENT.REMEDY. *See* ACTION; DAMAGES; DISTURBANCE; INJUNCTION.

- by act of party, 499.
- by action at law, 503.
- by injunction, 524.

REMOVAL. *See* ABATEMENT; NEGLIGENCE; SUPPORT.

- of encroachment, care required in, 385 *et seq.*

RENT

- for an easement, 2, 200, 337.

REPAIR,

- dominant owner bound to repair artificial work, 433.
 - has a right to, 431.
 - must make good damage done in, 441.
- easement to compel servient owner to, 420.
- liability to, whether runs with land, 430, 82.
- obligation to repair upper rooms for benefit of lower, and *vice versa*, 421, 425.
- of bridges, prescriptive liability for, 430.
- of fences,
 - by turnpike trustees, 412.
 - easements relating to, 409.
- of highways, 430.
- of river banks, 431.
- of sea-wall, 431.
- of watercourse, 431, 433.
- pulling down house for, does not destroy easement, 444.
- servient owner not bound to, at common law, 419.
- want of, how affects right to support, 371.
- liability to, in cases between landlord and tenant, of flats, 425.

REPLY,

- none unless ordered, 521.

REQUEST TO ABATE,

- when necessary before abatement, 501.

RESERVATION,

- easement not the subject of, in grant under Statute of Uses, 77.
- effect of the Conveyancing Act, 78.
- easement of necessity arises on, 168.
- express, effect of, 91.
- of close, negatives easements over it, 91.
- of easement, may be binding in equity without deed, 64.
 - not implied, 153.
 - except easement of necessity, 167.
 - of support when implied on grant of land with buildings, 373.
- of rent in respect of easement, 2.

RESTORATION

- of windows after alteration, effect of, 463 *et seq.*, 479.

RESTRICTIVE COVENANTS, 80.

REVERSIONER. *See* DAMAGE.

- acquiescence of, 69.
- action by, 505 *et seq.*
 - pleading in, 524.
- right of, to sue, 506.
- when bound by acquiescence, 69.
 - by user during particular estate, 213, 215, 218.
- when he may sue for disturbance to easement, 506.
 - for infringement of natural right, 509.
- semble, he may sue in all cases in which the continuance of the act complained of would become evidence of a right against him, 507.
- when, liable for disturbance, 513.
- within what time he must interfere after particular estate ends, 204, 207.

REVIVAL OF EASEMENTS,

- none, 455.

REVOCATION

- of licence, 62.
- licensee is entitled to reasonable notice, 61.

RIGHT,

- as of, enjoyment must be, 202, 223 *et seq.*
- pleading must state enjoyment as of, 518.

RIGHT OF WAY. *See* WAY.

RIPARIAN OWNERS

- on artificial watercourse may be same as on natural stream, 273.
- natural rights of, are part of fee simple, 249.
- right to stream, 242.
- use of water, 247 *et seq.*
- who are, 250.

RIVER,

- property in soil of, 242.

ROOTS OF TREES,

liability for trespass by, 416, 450.

RUNNING WITH LAND, COVENANTS. *See* COVENANT.

RUSTIC SERVITUDES, 30.

SALMON,

obstructing free passage of, 249.

SAND,

right of digging, a *profit à prendre*, 1.

SCHOOL,

no nuisance, 397.

SCOTLAND,

easement can be created without deed in, 35.

Prescription Act does not apply to, 205.

SEA,

protection from inroads of, 412, 431.

SEAL. *See* DEED.

easement can be created without, in Scotland, 35.

effect when, missing from deed, 40.

required at law for creation of easement, 62.

release of easement must be under, at law, 459.

SECONDARY EASEMENTS, 435.

implied by law for the full enjoyment of primary easement, 435.

right of repair extends only to restore the easement to its original condition, 441.

when action lies for disturbance of, 498.

SECRET ENJOYMENT

gives no right, 225, 372.

SERVIENT TENEMENT,

burden on, must not be increased, 371, 440, 443, 449, 470, 475, 491.

owner of, may not render easement less easy of enjoyment, 449.

may repair, 451.

not bound to repair, 419.

unless by easement, 420.

whether liable for obstruction by roots or branches of trees, 450.

what is, 2.

SERVITUDES OF THE CIVIL LAW, 2, 22.

divided into rustic and urban, 30.

kinds of,

aque ducendæ, 263.

jus projiciendi, 271.

jus protegendi, 271.

ne luminibus officiatur, 306, 450.

ne prospectui officiatur, 306.

SERVITUDES OF THE CIVIL LAW—*continued*.

kinds of—*continued*.

onera vicini sustinendi, 382.

paries oneri ferendo, 444.

stillicidii vel fluminis recipiendi, 444.

tigni immittendi, 382.

loss of, by cessation of enjoyment, 464, 489.

origin of, 31.

SETTLED LAND ACT, 1882,

grant of easement under, 33.

lease of easement under, 34.

release of easement under, 450.

SETTLED LAND ACT, 1890,

exchange of easement under, 34.

exchange of settled land, grant or reservation of easement on, 34.

partition, grant or reservation of easement on, 34.

SEVERANCE

of dominant tenement, effect of, 86, 448.

of two tenements,

rule in such case as to passing of,

(a) easements not continuous and apparent, 87.

where conveyance executed before 1882..87.

where conveyance executed since 1881..104.

(b) easements continuous and apparent, 113.

modern rule, 114.

rule applies although dominant or servient tenement is in lease, 124.

also where both tenements are in one mortgage, and mortgagee sells dominant, 125.

also where dominant and servient tenements are conveyed simultaneously, 125.

and in case of disposition by will, 131.

rule is subject to the contract and circumstances, 131.

rule further considered in special case of rights of way, 135-262.

disposition by will, 142, 150, 151.

effect of Conveyancing Act, 84, 104.

no implied reservation of easements, 154, 162.

SEWAGE,

discharge into sea, 404.

into river, 404.

nuisance by, 404, 280.

SEWER. *See* DRAIN.

right of support for, 112.

SHOOTING,

a profit à prendre, 1.

SIC UTERE TUO UT ALIENUM NON LÆDAS, 384, 451.

SIGN BOARD,

right to affix, is an affirmative easement, 27.

- SIGN POST,
easement to have, 27.
- SIMULTANEOUS SALES,
implication of grant of easement on, 125.
- SMELL,
nuisance by, 395.
- SMELTING HOUSE,
fumes, nuisance by, 395.
- SMOKE,
nuisance by, 396.
- SOAP BOILERY,
nuisance by, 396.
- SOIL OF RIVER BED,
property in, 242.
- SPOIL BANKS,
right to make, is an affirmative easement, 27.
- SPOUT,
easement to discharge rain water by a, 28, 270.
parol licence to turn a spout on to neighbour's land may be revocable,
61. *See* 65.
- SPRINGS OF WATER,
rights in, 261.
right to draw water from, an easement, 28.
- STAIRCASE,
liability to repair, 425.
- STATEMENT OF CLAIM, 520.
- STATEMENT OF DEFENCE, 520.
- STATUTE. *See* TABLE OF STATUTES.
easement extinguished by, may be re-acquired by user, 187.
case where absolute prohibition, 218.
effect of Canal and Railway Acts on mining, 353.
extinguishment of easements by, 457.
incapacity to acquire easements by reason of, 220.
no prescription against, 187.
user under, cannot be added to user independent of, to make up necessary period. *See* 518.
- STATUTE OF FRAUDS, 3, 10, 64.
- STATUTE OF USES,
grant of easements under, 77.
- STILLICIDIUM, 444.
- STORY, J.,
judgment of, in *Tyler v. Wilkinson*, 242.

STREAM. *See* WATERCOURSE.

fouling, actionable, 280.

grant of all streams, held to include wells, 285.

right to, includes accessions, 278.

to use, permission cannot be given to third party, 283

SUBJACENT LAND. *See* SUPPORT.

right to support from, 344.

SUBJECTS OF EASEMENTS, 26.

SUBSTITUTION

of other light, no defence to action for disturbance, 298.

SUBTERRANEAN WATER,

fouling, actionable, 280.

unless easement acquired, 281.

in defined and known channel only, right to, 253.

may be intercepted if percolating, 255.

no right to support from, 344.

SUPPORT, 343 *et seq.* *See* HOUSES; MINES; NEGLIGENCE.

1. Of land by adjoining land adjacent or subjacent, 344.

a right of property not an easement, 343.

character of the right explained, 345.

effect of easement to let down surface, 347.

easement to let down surface can be acquired by prescription,
347.

grant of minerals, 349.

lease of minerals, 349.

statutory provisions as to working mines on notice, 354.

Railway Acts, 354.

Canal Acts, 355.

no right of support from underground water, 344.

right to support from semi-liquid silt or pitch, 345.

2. Of buildings by adjoining land, 357.

a negative easement, whether, 366.

no natural right to, 357.

though house is modern, yet if the land would have fallen in
though unencumbered by buildings, an action will lie for
withdrawing support, 370.

no right to, from underground water, 344.

right to, acquired by twenty years' user, 370.

if buildings in good repair, 371.

and properly constructed, 372.

right to support from semi-liquid silt or pitch, 345.

when grant of right implied, 111, 372.

when land granted for purpose of building, 111.

with buildings already erected, 372.

taken under Railway or Canal Act, 112.

when reservation of right implied, 373.

whether within Prescription Act, 197, 370.

SUPPORT—*continued*.

- 3. Of buildings by buildings, 29, 373 *et seq.*
 - if encroachment be not clam, and be capable of being resisted, *semble*, such an easement of support may be acquired by enjoyment, 374.
 - would exist as "disposition of owner of two tenements," where both houses originally belonged to the same owner, 374.
 - whether easement of necessity, 375.
 - whether right can be acquired by prescription, 374.
- when statutes of limitation begin to run, 382.
- where no right to support, no action for taking it away, unless manner of removal causes fall, 385.
- where right of support, burden may not be increased. *See* 371.
- whether a negative easement. *See* 366.
- whether extraordinary degree of, can be acquired, 227.
- whether person in possession of servient tenement when subsidence occurs necessarily liable for the damage, 346.

SURVEYOR,

- reference to, 533.

SUSPENSION OF EASEMENTS

- by unity of ownership, 454.

TAN HOUSE

- may be a nuisance, 396.

TEMPORARY INJURY,

- when restrained by injunction, 525.

TENANT FOR LIFE,

- how reversioner affected by enjoyment of easement against, 211, 213, 215, 216.
- power of, to grant lease of easement, 34.
- to sell or release easement, 33, 34.

TENANT FOR YEARS,

- effect of enjoyment of easement by, 220, 227.
- how reversioner affected by enjoyment of easement against, 211, 213, 215, 216.
- lost grant, presumption of, where servient tenement in lease, 213, 214.
- obstruction by, when landlord liable for, 513, 514.
- prescribing against landlord or tenant of same landlord, 214, 216
- when, entitled to sue, 505.

TENANTS IN COMMON

- of party-wall, rights of, 407.

TENEMENTS,

- conveyance of, passes easements appurtenant, 83.
- dominant and servient, 2.
 - both required for easement, 11.
 - must belong to different owners, 14.
 - whether dominant, must have been actually acquired at date of grant, 16, 35.

TENEMENTS—*continued*.

effect of severance of dominant, 86, 448.

implied grant on severance of two. *See* SEVERANCE.

TERMINI

of way, to be set out, 339, 340.

to be stated in pleading, 522.

THEATRE,

licence to use seats in, 55, 63.

THREATS

not a disturbance, 498.

TIME. *See* ENJOYMENT; LENGTH OF TIME; PRESCRIPTION.

length of, necessary for acquisition of easement by prescription, 183
et seq.

TITLE. *See* EASEMENT; PRESCRIPTION ACT; SUPPORT.

allegation of, in statement of claim, 521.

defect in, easement is, 7.

TRACK,

visible, how far required in order that way may pass, 101, 153.

TRADE,

noisy, licence to carry on, 42. *See* 62.

offensive. *See* NUISANCE.

whether amount of light measured by requirements of, 296. *See* 302.

TREES,

obstructing light, 450.

fruit trees, easement to nail to a wall, 27.

no easements for roots of, to project into neighbouring soil, 415.

obstruction by, whether owner of servient tenement liable for, 450.

overhanging branches of, actionable, 418.

may be cut, 418.

no easement for, 418.

quere, in whom the property of trees growing on the boundary of two estates is vested, 417.

TRESPASS. *See* ABATEMENT.

by cattle, liability for, 410.

liability for injury to cattle sustained in, 410.

or case, 517.

to abate nuisance is not actionable, 500.

TUNNEL,

licence for, 38.

right to, whether hereditament or easement, 27. *See* 8.

TURNPIKE,

liability to fence and repair, of trustees of, 412.

- UNDERGROUND WATER, 253, 255. *See* PERCOLATING WATER and SUBTERRANEAN WATER.
- UNDERTAKING,
 as to damages, 528.
 to pull down, if required at trial, 528.
- UNITY. *See* OPERATION OF LAW; POSSESSION.
 of ownership, extinguishment of easements by, 14, 114, 177, 453.
 provided the estates in both tenements be of an equally high and
 perdurable nature, 454.
 otherwise easement suspended only, 454.
 ways of necessity, whether extinguished by unity of ownership, 177.
 unity of seisin without unity of possession, 183.
 of possession, effect on claim by prescription at common law, 182.
 under Prescription Act, 182.
 case of light, 199, 216.
- UNREASONABLE,
 rule of reasonableness as affecting easements, 5, 6.
- URBAN AND RUSTIC SERVITUDES, 30.
- USE OF WATER. *See* STREAM; WATER; WATERCOURSE.
 overground water in defined channel, what user lawful, 248.
- “USED AND ENJOYED.” *See under* CONSTRUCTION.
 effect of these words, 88 *et seq.*
 deemed to be inserted by Conveyancing Act, 84.
 previous enjoyment as of right need not be shown, 91.
- USER. *See* ENJOYMENT.
 visible track important as evidence of, 101, 153.
 necessary for prescriptive title, user against whom, 210.
 by whom, 219.
- USES, STATUTE OF,
 grant of easement under, 77.
- VAGUE GRANT
 of right of way, 340, 341.
- VARIETY OF EASEMENTS, 26.
- VAULT,
 right to use, an easement, 29.
- VERBAL
 agreement for easement, effect of, 64.
- VI, 224.
- VIA, 314.

VIEW,

no easement giving right to enjoy, 305.

VIS MAJOR, 411.

WALL. *See* PARTY WALL; SUPPORT.

WARREN,

the case of, 115.

WATER. 240 *et seq.* *See* MINE; PERCOLATING WATER; STREAM; WATER-COURSE.

channel,

defined, 254.

known, 254.

construction of express grant of, instances of, 284.

damage need not be shown to sustain action for interference, 253.

discharge, easement for, 269.

right to, 269.

right to, with regard to artificial watercourses. *See* ARTIFICIAL WATERCOURSES.

whether bound to continue, of artificial stream, 279.

diversion of. *See* DIVERSION OF STREAM.

divert, prescriptive right to, 262.

easements in relation to, 262.

fish in natural stream, right to obstruct, 249.

heating of, actionable, 280, 535.

interference with, what, actionable, 253, 280.

licence to use, rights of licensee under, 282, 283.

may not be used for purposes unconnected with riparian tenement, 247.

mine-owner not liable for draining off stored water or surface water in working minerals, 255, 260.

natural rights in natural stream,

in defined channel,

overground, 240.

underground, 253.

in channel defined but not known, 254.

in undefined channel,

overground, 254.

underground, 255.

perception unnecessary, 253.

percolating, 253, 254. *See* PERCOLATING WATER.

pollution of, actionable, 279.

right of licensee in respect of, 282.

right of, may be acquired, 281.

Prescription Act, what are claims to, within, 197.

reasonable use of, what is, 248.

right of passage for, is an incorporeal right, 10.

right to compel continuance of discharge, 262, 269, 279.

discharge, 269 *et seq.* *See* DISCHARGE, *supra*.

receive flow of, in artificial stream, a negative easement, 29.

natural stream, 240.

WATER—*continued.*

- Riparian owners, who are, 250.
- natural rights are part of fee simple, 249.
- stored in wells, draining off, 255.
- stored, may be drained off in working minerals, 255, 260.
- subterranean, 253, 255. *See* SUBTERRANEAN WATER.
- supporting land or building, may be drawn off, 344.
- surface, may be drained off in working minerals, 255.
- use of, in natural stream, what is reasonable, 248.
- user of, by artificial means, 249.

WATERCOURSE, 28, 197, 284. *See* EASEMENT; EXTINGUISHMENT;

PREScription; STREAM; WATER.

artificial, right to, 24, 272.

precarious enjoyment of, 229, 273, 279.

discharge on servient tenement, right of, by, 270.

whether bound to continue, 262, 269, 279.

diversion of, 262.

right to continuance of, 262.

duty to repair artificial, falls on dominant owner, 432.

grant of,

by virtue of general words inserted by Conveyancing Act, 84.

constructive, by acquiescence, 66, 71, 73.

express, how construed, 284.

implied on severance of two tenements, 114, 116, 118, 121, 123.

but not where watercourse made for temporary purpose, 124.

licence to use, effect of, against other riparian owners, 283.

loss of, by non-user or alteration of user, 463, 466, 468.

natural right to part of fee simple, 249.

parol licence for, 43, 62.

provision of Prescription Act as to, 197.

receive through, on servient tenement, right to, 269.

repair, dominant owner liable for, 432.

riparian owner, rights of, 240.

verbal grant of, good in equity, 64.

whether act of appropriation necessary for acquisition of natural right to, 252.

WAY, 312 *et seq.* *See* EASEMENT; EXTINGUISHMENT; GRANT; NECESSITY;

PREScription.

a non-continuous easement, 29.

abandonment of, 481.

acquisition of. *See* EASEMENTS, acquisition of.

under general words inserted by Conveyancing Act, 84, 103.

by implied grant, on severance, 114, 135 *et seq.*

under will, 142, 150, 151.

by necessity, 167.

by prescription, 182 *et seq.*

enjoyment necessary to confer right, 210, 221, 316.

notwithstanding gate kept locked, 228, 495.

an affirmative easement, 26.

apart from tenement, not an easement, 11.

WAY—*continued.*

- church, way to, 312.
- construction of particular grants, instances of, 335 *et seq.*
- degrees of, 312, 314.
 - whether one evidence of another, 322.
 - kind includes another, 321.
- deviation from, if foundrous, 435.
- direction of, by whom determined, 178, 341.
- excessive user of, 491.
- express grant or reservation of, how limited, 333.
- extent of,
 - acquired by grant, 326.
 - user, 316.
- extinguishment of,
 - by alteration of user, 490.
 - by licence to obstruct, 460.
 - by obstruction acquiesced in for long period, 482.
 - by release,
 - express, 459.
 - implied, 460.
 - by unity, 453 *et seq.*
- foundrous, deviation not justified, 435.
- gate across, whether may be erected, 495. *See* 228.
- grant of. *See* ACQUISITION OF EASEMENTS; GRANT.
 - express, by general words inserted by Conveyancing Act, 84, 103.
 - by grant of easements,
 - "appertaining and belonging," 88.
 - "used and enjoyed," 88.
 - how construed, 326, 335.
 - how limited, 333.
 - implied on severance of two tenements,
 - as continuous and apparent, 114, 135 *et seq.*
 - as of necessity, 167.
 - direction of, 178, 341.
 - duration of, 174.
 - extent of, 174.
 - lost grant, by, 186.
 - under Prescription Act, 197.
- incorporeal right is, 10.
- may be appurtenant to an incorporeal right, 15.
- may not be used to go to property other than dominant tenement, 333.
- necessity of, 178. *See* NECESSITY.
 - direction of, 178.
 - extent of, 174, 325.
- obstruction to, may be abated, 500.
 - whether erection of gate is, 495, 496. *See* 228.
- public, not an easement, 13.
- repair, on whom falls, 419, 433.
- severance, whether ways pass on, 87 *et seq.*, 135 *et seq.* *See* SEVERANCE.
- termini of, 339, 340.
 - should be stated in pleading, 522.
- to "assigns" includes all licensees, 335.

WAY—*continued*.

to church, 312.

to market, 167.

user,

effect of cessation of, 481.

alteration of, 490.

extent of right acquired by, 316.

of way granted,

persons entitled to use, 335.

mode of user, 335.

extent of user, 338.

visible track or formed road, effect of way being, 101, 153.

WEIR,

diversion of stream by, 263.

parol licence for, 43. *See* 62.**WELL,**

no action for draining neighbour's, 255.

WILL,

easement can be created by, 35, 62.

easements implied on disposition of two tenements by, 131.

WINDMILL,

no right to passage of air, 308.

WINDOW. *See* LIGHT.

alteration of,

plane of, 475 *et seq.*position or size of, effect of, 470 *et seq.*

blocking up, by owner of, effect of, 463.

decrease in size of, 474.

enlargement of, 473.

evidence of position, &c., of old windows should be preserved on alteration, 479.

existence of in house sold, implied right to light over vendor's land, 114, 124 *et seq.*

not when in house reserved, 162.

grant or lease for express purpose of grantee building, grantor cannot obstruct, 16, 111.

of some kind essential for easement of light, 290.

owner of house need not reside there to obtain injunction to restrain obstruction to, 290, 505.

restoration of, after alteration involving encroachment, 480.

after pulling down to rebuild, 444, 463.

right to obstruct if not ancient, 288.

right to open, overlooking neighbour's land, 288.

skylight is sufficient aperture to obtain right to light for, 290.

WORDS. *See* CONSTRUCTION.

“appertaining, belonging,” &c., not sufficient to pass way or conveyance by owner of two tenements, 88.

WORDS—*continued.*

“convenient” in Prescription Act, a mistake, 207.

“used, occupied and enjoyed,” effect of, 88.

what words sufficient to pass easement not expressly mentioned, 83.

YATES *v.* JACK,

order in, 532.

not now suitable, 532.

THE END.

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